147 U. S. 360

RECORD, CASE No. 15,130.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1160.

JOHN GLENN, AS TRUSTEE OF AND FOR THE BENEFIT OF THE CREDITORS OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

DAVID J. GARTH, ROBERT A. LANCASTER, AND SAMUEL J. HARRISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 13, 1892.

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a In the Supreme Court of the United States.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff in Error,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Defendants in Error.

Affidavit of Service of Citation.

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*
City and County of New York,

Harry S. Goodridge, being duly sworn, says that he is thirty years of age, and resides at No. 157 West 16th street, in the city of New York, New York; that he is and for several years last past has been a clerk in the office of Burton N. Harrison, Esquire, attorney and of counsel for the plaintiff in error in the action here above entitled, who was also the attorney of record for said plaintiff in the court below, and that he is personally acquainted with David J. Garth and Samuel J. Harrison, defendants in error, and with Robert L. Harrison (survivor of the late firm of Reynolds & Harrison), the attorney of record for Robert A. Lancaster, the other defend-
b ant in error, who was a defendant in the court below, and with William C. Clopton and John R. Abney, attorneys of record in the court below of the said David J. Garth and Samuel J. Harrison, as here below mentioned, respectively.

Deponent further says that he made personal service of the within citation upon said David J. Garth, defendant in error, at his residence, near Scarsdale, in Westchester county, New York, on the 27th day of August, 1892, by then and there showing the original citation to said Garth and handing to and leaving with him (said Garth) a copy thereof; that deponent made personal service of the within citation upon said Samuel J. Harrison, defendant in error, at his residence, No. 124 State street, Brooklyn, New York, on the 29th day of August 1892, by then and there showing the original citation to said Samuel J. Harrison and handing to and leaving with him (said Samuel J. Harrison) a copy thereof, and that deponent made personal service of the within citation upon Robert L. Harrison (the attorney of record in the court below of Robert A. Lancaster, the other defendant in error), at his office, No. 59 Wall street, in the city of New York, New York, on the 6th day of September, 1892, by then and there showing the original citation to said attorney of record and handing to and leaving with him (said Robert L. Harrison, attorney as aforesaid) a copy thereof.

Deponent further says that prior to either of said services and on the 26th day of August, 1892, he served the said citation on
c John R. Abney (the attorney of record in the court below of said Samuel J. Harrison, defendant in error) by leaving a copy thereof at his office, No. 80 Broadway, in the city of New

York, New York, with the person then in charge of the office (the said Abney being then absent) and showing the original citation to said person; that deponent, on said 26th day of August, 1892, served the said citation on said William C. Clopton (the attorney of record in the court below of said David J. Garth, defendant in error) by leaving a copy thereof at his office, No. 41 Wall street, in the city of New York, New York, with the person then in charge of the office (the said Clopton being then absent) and showing the original citation to said person, and that deponent, on said 26th day of August, 1892, served the said citation on said Robert L. Harrison (the attorney of record in the court below of said Robert A. Lancaster, the other defendant in error) by leaving a copy thereof at his said office, No. 59 Wall street, in the city of New York, New York, with the person then in charge of the office (the said Robert L. Harrison being then absent) and showing the original citation to said person.

HARRY S. GOODRIDGE.

Sworn to before me this 7th day of September, 1892.

{ Seal Henry P. Butler, United States Commissioner, Southern Dist. of N. Y. }

HENRY P. BUTEER,
U. S. Commissioner for the Southern Dist. of N. Y.

d In the Supreme Court of the United States.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff in Error,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Defendants in Error.
} Citation.

The United States of America to David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the twenty-third day of September next (1892), pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, first judicial district (in the county court-house, in the city and county of New York), wherein John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, is the plaintiff in error and you (having been in the action in the said the State court impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter) are the defend-
e ants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error and in your favor, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Patterson, one of the justices and now the presiding justice at the special term of said the supreme court of the State of New York, first judicial district (the court by which the judgment complained of by the plaintiff in error was entered and was by order directed to be entered), this 24th day of August, in the year one thousand eight hundred and ninety-two.

EDW'D PATTERSON,
Justice Supreme Court, State of New York, Presiding at Special Term this 24 Day of August, 1892.

f [Endorsed:] Supreme Court of the United States. John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, plaintiff in error, against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, defendants in error. Citation on writ of error. Burton N. Harrison, counsel for plaintiff in error, 120 Broadway, New York. Filed Sept. 9, 1892.

Service of the within citation is hereby admitted.
Dated New York, August 26, 1892.

SAM'L J. HARRISON,
Def't in Error.

g UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, first judicial district, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you or some of you, between John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, as the plaintiff therein, and David J. Garth, Robert A. Lancaster, and Samuel J. Harrison (who were impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter), as the defendants therein, the said court being the highest court of law or equity of the said State of New York in which a decision could be had in the said suit between said John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, as plaintiff therein, and said David J. Garth, Robert A. Lancaster, and Samuel J. Harrison (who were therein impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter), as defendants therein, wherein a title, right, privilege, or immunity was claimed by said plaintiff therein under the Constitution of the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by said the plaintiff in said suit under said the Constitution, a
h manifest error has happened, to the great damage of the said John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, the plaintiff in said suit and now plaintiff in error, as is said and appears by his

complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of September, 1892, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of August, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

i The foregoing writ is hereby allowed.

(There is no chief justice or presiding justice of the supreme court of the State of New York, though there is a presiding justice of the general term of said court in each of five judicial departments. The presiding justice of the first department, which consists of the city and county of New York (being coextensive with the first judicial district), is now absent from the State and I am the only justice of the court now sitting or assigned to sit within said first judicial district. The judgment complained of by the plaintiff in error is a judgment entered by direction of the court at special term in the first judicial district on a remittitur from the court of appeals. I am now the justice presiding at such special term of the court, to which I have been regularly assigned, and with all the powers of such a justice.)

EDW'D PATTERSON,
Justice Supreme Court of the State of New York, Presiding at Special Term this 24 *Day of August*, 1892.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

j [Endorsed:] Supreme Court of the United States. John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, plaintiff in error, against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, defendants in error. Writ of error. Filed Aug. 26, 1892, -- hr., — min. Burton N. Harrison, counsel for plaintiff in error, 120 Broadway, New York.

k

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*
City and County of New York,

I, William J. McKenna, clerk of the supreme court of the State of New York, in the first judicial district, and of the city and county of New York, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 266, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, plaintiff in error (who was plaintiff in said court), against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, defendants in error (who were impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter, as defendants in said court), as the same remain of record and on file in said court, and that to said papers are attached the certified copies of the opinions of the court of appeals heretofore filed in said court and in my office as clerk thereof, and that with said papers I hereby make return also of the citation and proof of service thereof, the assignment of error, a copy of the security taken by the judge who signed the citation and now on file in my said office, and a copy of the petition for the writ of error.

l In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the first judicial district of the said supreme court Seal New York. of the State of New York, the 8th day of September, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

WM. J. McKENNA, *Clerk.*

m

Court of Appeals.

JOHN GLENN, as Trustee of, &c., &c., the National Express and Transportation Company, Plaintiff, Appellant,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Impleaded with Others, Defendants, Respondents.

Case on appeal from order made at general term of the supreme court, in the first department, sustaining the exceptions taken by defendants at the trial at circuit in the city and county of New York (where a verdict was directed in favor of the plaintiff and defendants' exceptions were ordered to be heard in the first instance at the general term) and granting a new trial.

Burton N. Harrison, attorney for plaintiff, appellant; William C. Clopton, attorney for defendant-respondent Garth; Robert L. Harrison, attorney for defendant-respondent Lancaster; John R. Abney, attorney for defendant-respondent Harrison.

1 *Statement.*

Supreme Court, General Term, First Department.

JOHN GLENN, as Trustee, &c., Plaintiff, *against* SAMUEL J. HARRISON, DAVID J. GARTH, WELLington Goddin, James L. Apperson Robert A. Lancaster, and Lewis Ginter, Defendants.	Statement Required by Rules.

This action was commenced October 28, 1886, by issuing the summons that day dated and the complaint that day verified for service.

The summons and complaint were served on the defendant Samuel J. Harrison December 9, 1886; on the defendant Robert A. Lancaster December 9, 1886; on the defendant David J. Garth December 11, 1886. No service of either the complaint or the summons was ever made on either of the other defendants, all of whom are non-residents, and neither of whom was found within the jurisdiction.

The separate answer of the defendant Garth was served April 2, 1887.

2 The separate answer of the defendant Samuel J. Harrison was served April 5, 1887.

The separate answer of the defendant Lancaster was served April 5, 1887.

Neither of the other defendants ever served an answer or appeared in the action.

The names of the original parties in full are as set forth in the title of the action here above printed, and no change of any of the parties has taken place pending the action.

There has been no change in the attorneys for any of the parties.

CITY AND COUNTY OF NEW YORK, *ss:*

William C. Clopton, being duly sworn, says that he is the attorney for the defendant David J. Garth in the action here above entitled, and that no opinion in writing was given by the court below.

WILLIAM C. CLOPTON.

Sworn to before me this 20th day of May, 1891.

HARRY S. GOODRIDGE,
Notary Public, New York County.

3 Supreme Court.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, WELLINGTON GODDIN, JAMES L. APPERSON, ROBERT A. LANCASTER, and LEWIS GINTER, Defendants.

Trial Desired in the City and County of New York. Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, October 28, 1886.

BURTON N. HARRISON,
Plaintiff's Attorney.

Office and post-office address, 55 Liberty street, New York city, New York.

4 Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, WELLINGTON GODDIN, JAMES L. APPERSON, ROBERT A. LANCASTER, and LEWIS GINTER, Defendants.

Complaint.

The plaintiff, as trustee as hereinafter set forth, complaining of the defendants, by Burton N. Harrison, Esquire, his attorney, alleges and shows to the court as follows:

As and for a first cause of action by the said plaintiff, as such trustee, against the said defendants, the plaintiff alleges:

First. That the defendants heretofore were copartners, and as such copartners carried on business in the city of New York and elsewhere, under the firm name of "Harrison, Garth & Co.," in which firm name and as such copartners the defendants became the assignees, transferees, and holders of the four hundred and ninety shares hereinafter mentioned of the National Express and Transportation Company.

Second. That the National Express and Transportation Company heretofore was and now still is a corporation of the State of Virginia, duly incorporated, organized, and existing under the laws of the said State of Virginia, and heretofore carried on business
5 as an express and transportation company in the said State of Virginia, in the State of New York, and in various other

of the United States and elsewhere; that, as plaintiff is informed and believes, the defendants, as such copartners and under said firm name of Harrison, Garth & Co., heretofore became the holders of four hundred and ninety (490) shares of the capital stock of the said corporation by assignment and transfer to them from the original subscriber or subscribers for said shares, and thereby became and were received and accepted by said company as stockholders in and members of said corporation for four hundred and ninety (490) shares of the stock of the said corporation, of the par value of one hundred dollars each.

Third. That under and by virtue of the contract between said corporation and the original subscriber or the several original subscribers for the shares of the capital stock of said corporation of which the defendants became the holders as aforesaid, as assignees and transferees, it was, for a valuable consideration, agreed by said original subscriber or subscribers, for himself and his assigns or for themselves and their assigns, that they severally would be liable for and pay to said corporation or to the assigns or assign of said corporation the sum of one hundred dollars on and for each and every share of the capital stock of said corporation so subscribed for in such installments and as and when such subscriber or subscribers or his or their assigns should be lawfully called upon to pay the same, according to the tenor and effect of the laws under which said company was so incorporated, and said subscription to and for said shares of stock was so made, whereby and by force of which said subscription said original subscribers became and were received and admitted to be stockholders in and members of said corporation severally, and, as such stockholders, severally undertook and agreed to sue and be sued, implead and be impleaded, contract and
6 be contracted with, in the name of said corporation, as to any and all matters touching or affecting the property, rights, or obligations of said corporation, the National Express and Transportation Company.

Fourth. That, as plaintiff is informed and believes, by force of the assignment and transfer to the defendants of the said shares of said capital stock and of the acceptance by said corporation of the defendants as stockholders and members, the defendants, as such assignees and transferees, became and were and now still are liable to pay to said corporation or its assign or assigns, in such installments and as and when the defendants should lawfully from time to time be called upon and required to pay the same, so much of the par value of each of the shares so held by them as had not been theretofore paid on said shares at the time when the same were assigned to and became the property of the defendants, and that, as plaintiff is informed and believes, by said laws and said assignment and transfer and acceptance the defendants became and were received and admitted as stockholders in and members of said corporation, and promised, undertook, and agreed to sue and be sued, implead and be impleaded, contract and be contracted with, in the name of said corporation, as to any and all matters touching or affecting the property, rights, or obligations of said corporation, and as to the

rights, duties, and liabilities of defendants as stockholders in or members of said corporation.

Fifth. That at the time the said shares were so assigned and transferred to the defendants there remained unpaid the full sum of eighty dollars per share, which had not been theretofore required to be paid to said corporation or otherwise, and which said sum of eighty dollars per share the defendants, as plaintiff is informed and believes, became and were bound to pay in such installments and as and when the same should be lawfully required to be paid under and by virtue of the laws under which said company was in-
7 corporated, and said shares of stock were subscribed for and were assigned and transferred to the defendants as aforesaid.

Sixth. That on or about the 20th day of September, 1866, the said National Express and Transportation Company, by its deed of that date, duly executed, acknowledged, delivered, and recorded, assigned and transferred to John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, in trust for the benefit of the creditors of said company, according to a certain order of priority established by said deed, all the property of every kind and description belonging to said company; the legal effect and operation of which said deed of trust, under the laws of the State of Virginia, were such as are hereinafter set forth, as established by the decree of a court of said State having jurisdiction in the premises. Plaintiff further alleges that the said trustees accepted the said trust and deed of trust and entered upon the performance of the duties thereby imposed upon them. Plaintiff further alleges that the defendants, as stockholders of said corporation and contracting in that name, assented to all the terms of said deed of trust, according to the legal tenor and effect of the same, and thereby became bound by all the provisions of said deed of trust as to all corporate property affected by said deed, whether such corporate property was in the possession of said corporation or in the possession of said defendants.

Seventh. That at the time of the execution and delivery of said deed of trust the said corporation had called for and required to be paid by the persons, including the defendants, who were by law liable to pay one hundred dollars per share for the stock of said corporation subscribed for by them or held by or assigned to them severally, under the contract herein set forth, only a part, to wit, twenty per centum, of the par value of the shares of said stock, being twenty dollars per share, and had suffered the residue of the par value of the shares of said stock subscribed for or held by or assigned
8 to the shareholders, to wit, eighty dollars per share thereof, to remain in the hands of the persons severally liable to pay the same, including the defendants, subject to be called for and required to be paid by such persons, including the defendants, as and when the payment of the same should be required for the purposes of said corporation, according to the legal tenor and effect of the contract of subscription and the laws of the State of Virginia regulating said contract and prescribing the obligations of the stockholders of said corporation.

Eighth. That the trustees appointed by the said deed of September 20, 1866, not having performed the trusts reposed in them by said deed, a suit was instituted in the said State of Virginia, in the chancery court of the city of Richmond, a court of the said State of Virginia of competent jurisdiction in the premises, on or about the 28th day of November, 1871, by William W. Glenn, a creditor of said company, in his own behalf as a creditor of said the National Express and Transportation Company and on behalf of all other creditors of said company, against the said company, its president and the several members of the board of directors, and the said Hoge, O'Donnell, and Kelly, the last three the trustees named in said deed of trust, to obtain a judicial determination of the legal validity and effect and scope of said deed of trust, and to require said company to call for so much of the said eighty dollars per share of the stock of said company as had not theretofore been called for and would suffice to pay the debts of said company, upon an accounting had of its debts and of the amount necessary to pay the same, which said accounting it was sought to have taken in said suit. Process in said suit was prayed against said corporation, but by clerical error process was not issued against the corporation, but was issued against its officers and directors named as defendants in the bill of complaint. Subsequently an amended and supplemental bill was filed in said cause by John W. Wright, sheriff of the said city of Richmond, and as such official administrator of said William W. Glenn, the original complain-
9 ant, and who had died since the filing of the original bill, against said National Express and Transportation Company, said John Blair Hoge and John J. Kelly, the last two the only then surviving trustees under said deed of trust of September 20, 1866, and others, asking for the same relief that had been sought by the original bill in said cause, and for the removal of the original trustees and the appointment of new trustees or a new trustee under said deed, and also praying that, because of the default and neglect of said corporation to make a call upon its stockholders sufficient to pay the debts of the company, the said court should proceed to ascertain the debts due by said company and the amount necessary to be called for to pay the same from those who were liable to pay the eighty dollars per share then yet uncalled for of the par value of the shares of stock of said company, and that such debts be established and decreed to be paid; and also praying that all proper process issue, that all proper orders and decrees be made, and that all such other, further, and general relief be granted as the nature of the case might require and to equity should seem meet; the said National Express and Transportation Company was duly served with process as a defendant in said suit, and it was so proceeded therein that, on the 14th day of December, 1880, the said chancery court of the city of Richmond, a court having jurisdiction of said cause and of said trustees and of said company, did adjudge, order, and decree, among other things, as follows—that is to say:

1. That the deed of trust of September 20, 1866, hereinbefore re-

ferred to, was and is a valid deed of trust under the laws of the State of Virginia, under which said corporation was created.

2. That said deed, by its legal effect, passed to the trustees therein named and their lawful successors all the property belonging to said corporation, including the amount in the hands of its stockholders and others liable to pay the same, which had not been called
10 for by said company, to wit, the eighty dollars per share of the par value of said shares of stock that had not been called for by said company.

3. That while, by the legal operation of said deed of trust, the right to receive and have said eighty per cent. of the par value of said shares of stock, or so much thereof as might be necessary to pay the debts of the company, passed to said trustees and their successors under said deed of trust, neither the said trustees nor their successors had any legal right to sue for or recover said uncalled amount, or any of it, of eighty per centum of said par value of said shares of stock from the persons liable to pay the same, unless and until a call for the payment of the same or some part thereof should first have been made by said company, or, on default of such call by said company, by the court.

4. That there was due and unpaid by said company and secured by said deed of trust a certain amount of indebtedness to each of the persons named in said decree, including the original complainant Glenn, and others who had become parties to said cause as creditors of said company.

5. That there remained no means wherewith to pay said debts except the amount of the capital stock of said company that had not been called for by said company, and that a call of thirty per centum of the par value of said shares of stock was necessary to pay the expenses of administering the trusts of said deed and paying the creditors whose claims were established against the said trust estate by said decree.

6. That the trustees named in said deed of trust be, and by said judgment, order, and decree they thereby were, removed from the trust, and that the plaintiff be and thereby was appointed to be trustee in their room and stead of said trust and under said deed of trust.

7. That the stock and stockholders severally of said com-
11 pany, their legal representatives and assigns, be and thereby were assessed thirty per centum of the par value of the shares of stock held by them respectively or for which they were liable, and requiring them to pay said assessment to the plaintiff as substituted trustee under said deed of trust and directing the plaintiff to proceed to collect and receive said assessment or call from each and all the persons liable to pay the same.

8. That said suit be, and thereby was, retained for further action of the court in case a further call or assessment on the stock and stockholders should be found necessary to pay the debts secured by said deed of trust and for the other purposes of said decree.

And the plaintiff further alleges that afterwards and on the 3d day of January, 1881, he duly qualified as substituted trustee under

said decree and was duly accepted as such by the decree of said court, by force whereof and by the laws of the said State of Virginia for such case made and provided he, the said plaintiff, then and there became and was and now still is substituted to and vested with all the rights, powers, duties, and responsibilities of the trustees named in said deed of trust, and became and was and still is lawfully entitled to collect and receive the said assessment or call of thirty dollars per share on each share of the stock of said corporation from the persons severally liable to pay the same, including the defendants, and the plaintiff has duly demanded payment by the said defendants of the amount due by said defendants under said decree.

Ninth. That by force of said contract of subscription to the capital stock of said company, and by force of the ownership by the defendants of said four hundred and ninety (490) shares of said capital stock, and by the legal operation of said deed of trust of September 20, 1866, and of the decrees of said chancery court of the city of Richmond of December 14, 1880, and January 3,
12 1881, above referred to, and of the other facts hereinbefore alleged, the said defendants became and were, as the plaintiff is informed, advised, and believes and now charges, indebted and liable to pay to said plaintiff the sum of fourteen thousand seven hundred ($14,700) dollars, being the amount of thirty dollars on and for each and every share of the capital stock of said corporation so as aforesaid subscribed for or held by or assigned and transferred to said defendants; that, being so liable to pay, the defendants, as plaintiff is informed and believes, in consideration thereof, heretofore promised, undertook, and agreed to pay said sum to the plaintiff when thereto requested; that the plaintiff heretofore demanded payment of the said sum to him by the defendants, but that, though thereto requested by the plaintiff, the defendants have failed, neglected, and refused to pay the same or any part thereof to the plaintiff, and are now still indebted to the plaintiff in the full amount of said sum of fourteen thousand seven hundred ($14,700) dollars, with interest thereon from the said 14th day of December, 1880.

As and for a second and separate cause of action by the plaintiff, as such trustee, against the said defendants the plaintiff further alleges and shows to the court:

First. That the plaintiff here repeats and realleges each and every allegation made in the above statement of the plaintiff's first cause of action against the defendants.

Second. That heretofore, but after the said orders, judgments, and decrees of December 14, 1880, and January 3, 1881, had been made and entered as aforesaid and upon proper proceedings duly had, as required by the laws of the said State of Virginia for such case provided, the said cause, instituted as aforesaid in the said chancery court of the said city of Richmond, in the said State of Virginia, was duly removed into the circuit court of the county of Henrico, in the said State of Virginia, a court of the said State of compe-
13 tent jurisdiction in the premises, in which court last named the said cause is now still pending, and that in said cause a

further order and decree was, on the 26th day of March, 1886, made and entered by said circuit court of the county of Henrico, the same being as aforesaid a court of the said State of Virginia of competent jurisdiction in the premises, in and by which further order and decree it was, among other things, therein by said circuit court of the county of Henrico, upon proper proceedings duly had, as by the laws of said State required, ordered, adjudged, and decreed that in addition to the said call of thirty per centum, being thirty dollars per share, it was, on said 26th day of March, 1886, proper and necessary to make a further call for an assessment of the residue of fifty per centum then remaining uncalled for and unpaid upon the capital stock and stockholders of the said corporation, the National Express and Transportation Company, including the defendants, and that it was therefore further ordered, adjudged, and decreed by said court in said cause and in and by said order, judgment, and decree that a further call and assessment be, and the same thereby was, made upon the stock and stockholders (including the defendants) of said corporation, the National Express and Transportation Company, of fifty per centum of the par value of said stock, being fifty dollars for and on each and every share thereof, and that the stockholders of said corporation and each and every of them, including the defendants, and their respective legal representatives and assigns be, and they thereby were, severally required to pay the several amounts by said order, judgment, and decree called for and assessed to this plaintiff, the substituted trustee as aforesaid in said trust and under said deed of trust from said corporation of the 20th day of September, 1866, in the proceedings mentioned, and the said trustee, this plaintiff, was by said order, judgment, and decree authorized and directed to collect and receive the amount of the said call and assessment and to take such prompt steps
14 toward that end by suit or otherwise and in such jurisdictions as he, the plaintiff, should be advised for the purpose of paying the debts of said corporation under the provisions of said deed of trust and the expenses of administration of the trust.

Third. That by force of said contract of subscription to the said capital stock and for the said shares of stock of said corporation and the assignment and transfer and the ownership of said shares, and by force of said deed of assignment and transfer in trust, and by force of said call and assessment so made by the said order, judgment, and decree of said court last mentioned and of the other facts here above alleged the defendants, as plaintiff is informed and believes, became and were indebted to and liable to pay to him, the plaintiff, the further sum of twenty-four thousand five hundred ($24,500) dollars, being the amount of fifty dollars per share on and for each and every of said shares of the capital stock of said corporation so as aforesaid subscribed for and to the defendants assigned and transferred or held by the defendants in addition to said indebtedness to plaintiff and said liability to plaintiff in the amount of thirty dollars per share on and for each of said shares so as aforesaid subscribed for and to the defendants assigned and transferred or held by the defendants, and that, being so liable to pay, the defendants

as plaintiff is informed and believes, in consideration thereof promised, undertook, and agreed to pay said further sum to the plaintiff when thereto requested.

Fourth. That the plaintiff heretofore demanded the payment of the said further sum to him by the defendants, but that, though thereto requested by the plaintiff, the defendants have failed, neglected, and refused to pay the same or any part thereof to the plaintiff, and that the defendants are now still indebted to the plaintiff in the full amount of said sum of twenty-four thousand five hundred ($24,500) dollars, with interest thereon from the said 26th day of March, 1886.

15 Wherefore the plaintiff, as trustee as aforesaid, demands judgment against the defendants for the sum of thirty-nine thousand two hundred ($39,200) dollars, with interest on fourteen thousand seven hundred ($14,700) dollars parcel thereof from December 14, 1880, and on twenty-four thousand five hundred ($24,500) dollars parcel thereof from March 26, 1886, besides the costs of this action.

BURTON N. HARRISON,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

John Glenn, being duly sworn, says that he, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, is the plaintiff in the action hereabove entitled; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN GLENN.

Sworn to before me this 28th day of October, 1886.

[L. S.]

J. NOBLE HAYES,
Notary Public, N. Y. Co.

16 Supreme Court, City and County of New York.

JOHN GLENN, Trustee, &c., Plaintiff, *against* SAMUEL J. HARRISON, DAVID J. GARTH, WELLington Goddin, James L. Apperson, Robert A. Lancaster, and Lewis Ginter, Defendants.	Separate Answer of Defendant Garth.

The defendant David J. Garth answers the complaint in the above-entitled action as follows:

First. This defendant does not admit that the copartnership of Harrison, Garth & Co. did exist as alleged in the complaint. This defendant has no knowledge or any information sufficient to form a belief as to whether the said National Express and Transporta-

tion Company mentioned in the second paragraph of the said complaint was or is a corporation of the State of Virginia duly incorporated, organized, and existing under the laws of the said State, as in the said paragraph alleged, and leaves the plaintiff to make such proof thereof as he may be advised. This defendant denies that the said pretended corporation heretofore or at any time carried on the business of an express and transportation company, as in the said paragraph alleged, except in the manner and to the extent hereinafter stated.

Second. This defendant, further answering, upon information and belief denies that the said firm of Harrison, Garth & Company mentioned in the second paragraph of the said complaint heretofore or at any time became the holders or owners of 490
17 shares of the capital stock of the said pretended corporation, the National Express and Transportation Company, by assignment and transfer from the original subscriber or subscribers for said shares or otherwise, and denies that the said alleged firm at any time became and were received and accepted by the said pretended corporation as stockholders in and members of the said corporation for 490 shares or any shares whatsoever of the capital stock of the said corporation, as in the said second paragraph alleged.

Third. This defendant, further answering, upon information and belief denies the existence at any time of the pretended agreement set forth in the third paragraph of the complaint, and upon like information and belief denies each and every one of the allegations in the said third paragraph of the complaint contained.

Fourth. This defendant, further answering, upon information and belief denies each and every one of the allegations in the fourth paragraph in the complaint contained.

Fifth. This defendant, further answering, upon information and belief denies each and every one of the allegations contained in the fifth paragraph of the complaint.

Sixth. This defendant, further answering, alleges that he has no knowledge and no information sufficient to form a belief as to the truth of the allegations contained in the sixth, seventh, and eighth paragraphs of the said complaint, and leaves the plaintiff to make such proof thereof as he may be advised.

Seventh. This defendant, further answering, admits that he has not paid the sum of money specified in the ninth paragraph of the said complaint, and he denies every other allegation contained in the said paragraph.

18 Eighth. This defendant, referring to the plaintiff's alleged second cause of action in the said complaint set forth and further answering, upon information and belief denies the allegations contained in the second paragraph of the said pretended second cause of action.

Ninth. This defendant denies upon information and belief the allegations contained in the third paragraph of the plaintiff's alleged second cause of action set forth in the said complaint.

Tenth. This defendant denies all the allegations in the said complaint not herein expressly admitted to be true.

For further, several, and separate defenses to the matters and things set forth in the said complaint and to all of them this defendant, not waiving, but insisting upon all and singular the allegations contained in his foregoing answer thereto, alleges:

First. This defendant, further answering, alleges that the said firm of Harrison, Garth & Co. were gold brokers and bankers, carrying on business in the city of New York at the time hereinafter mentioned, and that it was part of the business of the said firm to buy the stocks of corporations for the customers of the firm; that in the month of May, 1866, the said firm caused to be purchased for the account of one of its customers four hundred and ninety shares of the capital stock of the said National Express and Transportation Company, being the same shares mentioned in the complaint, at the board of brokers in the city of Baltimore in the regular course of business. This defendant alleges that he did not, and upon information and belief that the said firm did not, transfer nor cause or authorize to be transferred into the name of the said firm the stock so purchased for the said customer and by whom and not the said firm the said stock was owned; and this defendant further alleges that if any such transfer was in fact made it was made fraudulently and without authority and was and is void against this defendant.

19 This defendant further alleges on information and belief that by the authority or direction of the said customer for whom the said shares were purchased as aforesaid the said four hundred and ninety shares of stock were sold at the said board of brokers, in the city of Baltimore, on the 10th day of August, 1866.

This defendant is further informed and believes that if the said shares were not transferred on the books of the said company into the name of the purchaser it was because its transfer books had at that time been closed and such transfer was not possible. This defendant denies that either he or his said firm were ever the owners of the said shares or that the same were ever registered in its name upon the books of the said company with his authority or the authority or by permission of the said firm.

Second. That the pretended causes of action stated in the complaint did not, nor did either of them, accrue within six years before the commencement of this action.

Third. This defendant is informed and believes that on or about the 16th day of January, 1866, certain persons, associating themselves together under the name of the National Express and Transportation Company, pretended by virtue of such association to be a corporation under that name; that the said association or corporation remained in existence only until the 20th day of September, 1866, a few months after its organization, when it practically ceased to exist and has never since performed any corporate acts or exercised any corporate functions; that at or about the date last aforesaid all the officers of the said corporation resigned their respective offices and none were ever elected in their places; that on the date

last above mentioned the said company, under a pretended assignment of the terms and provisions of which this defendant has no knowledge, transferred and delivered all its property to three persons upon some pretended trust, namely, John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell.

Fourth. This defendant is further informed and believes that the said National Express and Transportation Company pretended to have authority to issue capital stock to the amount of five millions of dollars in shares of one hundred dollars each, and that between the date of its organization, on the 16th of January, 1866, and the transfer of its property and practical dissolution, on the 20th of September following, it had opened books of subscription for such shares; that over one thousand persons had subscribed for such shares, their subscriptions amounting in the aggregate to 43,556 shares; that such subscribers resided in many and widely separated States of the United States, and that but a small number thereof were or are residents of this State or within the jurisdiction of this court.

Fifth. This defendant upon information and belief further alleges that the aforesaid subscriptions to capital stock were payable by the subscribers upon the demand of the company and that prior to the said 20th day of September, 1866, the said company had demanded of each subscriber the payment of twenty per cent. upon each subscription, equivalent to twenty dollars per share, such demand amounting in the aggregate to $871,120, whereof, as this defendant is informed and believes, about the sum of $500,000 was paid and that subscribers to the amount in the aggregate of three hundred and fifty thousand dollars or over failed to comply with such demand and that no measures have ever been taken to enforce their liability in that behalf, and that such liability in every case has been long since barred and extinguished by the statute of limitations, which, as the defendant is advised and alleges, commenced to run as against the said company and its representatives and in favor of the several subscribers to the capital stock of the said company from the date of the respective subscriptions thereto.

Sixth. This defendant, further answering, on information and belief alleges that after the organization of the said National Express and Transportation Company, as hereinbefore stated, the company, having realized from its stock subscriptions and the assessment above mentioned more than five hundred thousand dollars, acquired a considerable plant and property for its business and actually commenced to carry on its express and transportation business to a limited extent, and at the time of the abandonment of the enterprise for which the company was created and the transfer of its property the available property and assets of the company exceeded in value the amount of its then outstanding indebtedness.

Seventh. This defendant upon information and belief further alleges that the said pretended assignees and trustees, Hoge, Kelly, and O'Donnell, never made or filed any inventory of the property of the said company so transferred to them as aforesaid, and never

made or rendered any account of their pretended trust in the premises, and were never called to account by any person whatsoever in any court or otherwise; that the property of the said company so transferred as aforesaid and applicable to the payment of its debts was fraudulently misappropriated and misapplied by the said pretended trustees to their own use or wasted and misappropriated in other ways unknown to this defendant, and that this plaintiff, the pretended successor in interest and title of the aforesaid pretended trustees, has never rendered any account of the said property or taken any measures to obtain the same or the proceeds thereof and for the application thereof to the payment of the debts of the said pretended corporation.

Eighth. This defendant is advised and alleges that the con-
22 tract, if any, was on the part of this subscriber a contract to pay the amount of the subscription upon the demand of the company therefor, and on the part of the company to proceed with due diligence and according to law to prosecute and carry out the enterprise in respect to which such subscription was made, and that the liability of each and every subscriber was dependent upon the performance by the company of its own undertaking in the premises, and that upon the transfer by the said company of all its property to the said pretended trustees above mentioned and the total abandonment of the enterprise and business for which it was created and organized and for the promotion and prosecution of which such subscriptions were made and the practical dissolution of the said corporation the contract obligation of the subscribers to such capital stock and of each of them was abrogated and thereupon ceased to exist; that if any liability whatsoever in the premises continued thereafter to exist as against the said subscribers it was limited and restricted to an obligation to contribute ratably and in proportion to their several subscriptions so much money as might be necessary to discharge the outstanding indebtedness of the company after the due application of the property and assets of the company, if called upon and required within due time and in due course of law, to make such ratable subscription by the order or decree of a court of competent jurisdiction in the premises in respect of the parties and subject-matter, with power to adjust, determine, and enforce the respective rights and obligations of all parties.

Ninth. In this behalf this defendant is advised and further alleges that if ever liable in any manner or form in respect to any subscription as alleged in the complaint that obligation, if any, existed and continued only for the period of five and at most six years from the date of the original subscription, which period has long since elapsed, and, further, that such liability, if any, was only in respect of any indebtedness that might remain after the
23 just application by the plaintiff or his predecessors in office as pretended trustees of all the property of the said company to the payment of its debts; and in respect of any balance of such indebtedness that might remain after such application to only so much thereof as might appear upon a just and proper accounting to be this defendant's due proportion of the common liability attach-

ing to all subscribers in respect of the premises. This defendant is moreover advised and alleges that any such subscriber who was required to pay or had paid more than his due proportion of the sum necessary to provide for such indebtedness would have a just right of contribution as against any other subscriber who has paid less than his due proportion, and that the subscriber so entitled to contribution would stand in the relation of surety to the subscriber or subscribers liable to such contribution; that, as hereinafter more at large set forth, the plaintiff now in this action seeking to recover from this defendant the full amount of his alleged liability has released and discharged a large proportion of the subscribers to the said capital stock at a nominal percentage of their respective subscriptions—that is to say, twenty or twenty-five per cent. of the amount thereof.

Tenth. This defendant alleges upon information and belief that there has never been any accounting in any court in respect of the property transferred by the said company to the said pretended trustees, Hoge, Kelly, and O'Donnell; that there has never been any accounting or judicial inquiry in respect to the amount of the indebtedness of the said company; that there has never been any accounting or inquiry in respect to the liability of the several subscribers to the stock of the said company for and in regard to the said indebtedness, and that for the reasons hereinafter at large stated this court is without any power or jurisdiction in the premises in respect to such accounting and the determination and adjustment of such liability, if any.

24 Eleventh. This defendant upon information and belief further alleges that Hoge, O'Donnell, and Kelly took no action in the premises in respect to the execution of their said trust, and that in the month of November, 1871, more than five years after the said pretended assignment, one W. W. Glenn brought a suit in the chancery court of the city of Richmond, in the State of Virginia, against William H. Perot and certain other persons, among them Joseph R. Anderson and M. G. Harmon, praying for a subpœna against the said Perot and others, and in his prayer for relief demanded, among other things, an account of the debts and assets of the said company and for an accounting on the part of the said alleged trustees, Hoge, O'Donnell, and Kelly; that such an assessment as might be necessary to obtain money for the payment of any balance of the indebtedness of the company to creditors might be made upon the subscribers to the stock of the company, and that the board of directors of the said company might be required to levy such assessments; that the pretended trust deed might be construed by the court; for the appointment of a receiver and for other relief. The said National Express and Transportation Company was not a party to the said suit, and a subpœna issued therein, as appears by the return endorsed by the proper officer, was served upon Joseph R. Anderson on the 25th of November, 1871, and upon M. G. Harmon on the 28th of November, 1871, and upon no other person or persons. There were no appearances in the said cause either by or on behalf of the persons so served or any other nom-

inal defendant, nor were there any other proceedings had in the said cause until the month of August, 1879. Before the date last mentioned the plaintiff Glenn had deceased, and one John W. Wright, by virtue of his office of sheriff of the city of Richmond and of the laws of the State of Virginia on that behalf, became the administrator of the estate of the said Glenn, the plaintiff in the said suit, about eight years after the commencement thereof, during which period, as above stated, no proceedings whatever had been taken therein.

25 Twelfth. This defendant on information and belief further alleges that in or about the month of August, 1879, the said Wright, as such administrator aforesaid, appeared in the said suit and filed an amended and supplemental complaint therein. To this supplemental complaint the said National Express and Transportation Company was made a nominal party by a prayer for subpœna, as well as the pretended president and director before mentioned. Of the nominal defendants the said Anderson and one Lorenzo Norvell, a pretended director, were alone residents of the State of Virginia, and a subpœna was served upon these persons respectively and upon one M. B. Poitiaux, the latter being alleged to be or to have been the cashier and treasurer of the said company. Afterwards, in the month of September, 1879, the said Poitiaux entered an appearance in the said suit and filed an answer therein denying that he was an officer of the company and denying and disclaiming any representative capacity, duty, or liability in the premises. In the following month of October the said Anderson also entered an appearance in the said suit and filed an answer therein denying that he was a director and officer of the said company and disclaiming all responsibility in the premises. The said National Express and Transportation Company was never served with process in the said suit and never appeared. The said chancery court of the city of Richmond never acquired any jurisdiction of the said corporation, and, as this defendant is advised and alleges, all the subsequent proceedings in the said action as against the said company were wholly without jurisdiction and void.

Thirteenth. Before the commencement of the suit in the preceding paragraph mentioned the pretended trustee, O'Donnell, had deceased; the pretended trustees, Hoge and Kelly, having then been made defendants, appeared in the said suit and filed their answers. This defendant is informed and alleges that at the date of the commencement of the said suit the said Hoge was a

26 resident of the State of West Virginia and therefore not within the jurisdiction of the said chancery court of the city of Richmond, and the said Kelly was a resident of the State of New York, and without the jurisdiction, and no service of process in the said suit had been made or could have been made upon the said two last-mentioned defendants which would have subjected them to the jurisdiction of the said court for the purpose of any order or decree that might be made in the said suit. This defendant is further informed and believes that by a fraudulent and collusive arrangement between the plaintiff in the said suit and the said Hoge and

Kelly the two persons last mentioned were induced to voluntarily enter their appearance in the said suit and to ask for their own discharge by the payment of a large sum of money to them by the plaintiff, and a promise made to them by the plaintiff of protection and immunity for their neglect, fraud, and misconduct in respect to the execution of their pretended trust under the before-mentioned assignment of the said company and in respect to the assets and property received by them or which ought to have been collected and properly administered by them under such assignment, and their disposition and misappropriation of the said property.

Fourteenth. This defendant upon information and belief further alleges that after the filing of the said amended and supplemental bill or complaint by the administrator, Wright, in the year 1879, and after the fraudulent and collusive appearance of the surviving alleged trustees, obtained in the manner and for the consideration above mentioned, sundry *ex parte* interlocutory proceedings were nominally had in the said suit, the said National Express and Transportation Company not being a party thereto and none of the officers or directors of said company appearing or in any manner contesting, and none of the stockholders of the said company or alleged subscribers to the capital stock thereof being parties to the said suit or in any manner appearing or intervening therein.

27 Among other things:

1. In the month of December, 1880, an order was entered removing the said Hoge and Kelly from their pretended office of trustees and appointing in their place and stead John Glenn, the plaintiff in this action.

2. There was a certain reference to a so-called commissioner, but no accounting or inquiry was directed or had in respect to the amount or disposition of the assets of the company which came or ought to have come into the possession of the said O'Donnell, Hoge, and Kelly, trustees, nor as to the disposition thereof. No inquiry was had or taken as to the validity or amount of the debts of the said company, nor has any judicial inquiry upon evidence ever been had as to the assets and property of the said company nor as to the indebtedness of the company, nor was any inquiry or determination had or directed as to the liability in the premises of the respective subscribers to the stock of the said company.

Fifteenth. Among other *ex parte* interlocutory proceedings had in the said suit, the plaintiff in this suit, John Glenn, the pretended substituted trustee, obtained from the said chancery court of the city of Richmond, in the month of July, 1883, an order authorizing and empowering him to compromise and settle the alleged liability in the premises of certain stockholders upon the payment by them of twenty-five cents on the dollar of the amount of their respective subscriptions for stock.

The plaintiff, in pursuance of the said order so obtained by him, received from one hundred and nine different stockholders, whose holdings in the aggregate amounted to 4,737 shares, the said percentage, and thereupon released and discharged them and each of them from all liability in the premises, acquitting each and all of

them from liability to contribute their just and *pro rata* share necessary for the payment of the debts of the said company, and depriving this defendant of all right of contribution in the event of being compelled to pay to the plaintiff the amount demanded
28 in this action; and this defendant is advised and alleges that this court is without power or jurisdiction in respect of the subject-matter or persons necessary to be dealt with in the premises in order to reverse, annul, and set aside the *ex parte* fraudulent and collusive proceedings of the plaintiff in obtaining the release and discharge of a large proportion of the subscribers of the capital stock of the said company upon the payment of a nominal percentage of their liability as such subscribers, while at the same time demanding in this action the payment by this defendant of the full amount of the alleged liability of the original subscriber or subscribers to the said capital stock, to whose liability it is pretended that this defendant has succeeded, and this defendant is advised and alleges that the plaintiff by his conduct aforesaid is estopped and precluded from maintaining this action to enforce his pretended demand against this defendant in respect to the premises. In this behalf this defendant further alleges that in respect of a part of the said original subscription the plaintiff, in pursuance of the said collusive and fraudulent order in the premises, accepted and received from the alleged original subscriber in respect of his subscription twenty-five per cent. upon the amounts of stock subscribed for and embraced in this action and alleged to have been transferred by him to this defendant's firm or copartnership.

Sixteenth. This defendant alleges that he was not a party to the aforesaid action in the chancery court of the city of Richmond, in person or by representation, and he is advised and alleges that he is not affected nor in any manner bound or concluded by any of the proceedings therein. This defendant further alleges that all of the said proceedings have been merely interlocutory and not final and have been had and conducted *ex parte* under the sole direction of the plaintiff and his attorneys; that the pretended interlocutory judgment against the said National Express and Transporta-
29 tion Company was taken by default, without any service of process upon or appearance by the said company.

Seventeenth. This defendant upon information and belief further alleges that no valid judgments have ever been recovered against the said pretended corporation, the said National Express and Transportation Company, in respect of any of its pretended indebtedness; that such indebtedness has never been established against the said corporation by any evidence in any legal proceeding; that the reports made from time to time in respect thereof were procured to be made by fraud and collusion between the plaintiff in this action and attorneys pretending to represent creditors who were at the same time in the service of this plaintiff, sharing under certain terms of distribution, the exact terms thereof being unknown to this defendant, the money extorted by threats, persuasion, or under color of legal proceeding from alleged subscribers to the stock of the said pretended National Express and Transportation Com-

pany, and, further, that all of the said pretended debts of the said corporation have long since been barred by the statute of limitations of the State of Virginia.

Eighteenth. This defendant upon information and belief alleges and charges that the said pretended action in the chancery court of the city of Richmond has been from the beginning and is now prosecuted in bad faith, fraudulently and collusively, and not for the purpose of compelling an equal and *pro rata* contribution from the alleged subscribers to the alleged capital stock or their assignees of such an amount as might be necessary to pay the just and established debts of the said corporation, but solely for the purpose of extorting and obtaining money to be distributed under the name of fees and expenses between the plaintiff and his associates in the enterprise, and, further, that all or nearly all of the
30 collections, amounting to a large sum, hitherto extorted through the instrumentality of the said pretended action has been so apportioned and distributed.

Nineteenth. This defendant is advised and alleges that the said chancery court of the city of Richmond had not at any time any power or jurisdiction to make the pretended call, order, or requirement for payments in respect to subscriptions to the said capital stock, and particularly to make such call or order upon this defendant, who was not and is not a party to the said action nor within the jurisdiction of the said court, and that the said court was and is without power or jurisdiction to create and impose any duty or obligation upon or cause of action against this defendant by its orders and decrees in the said action.

Twentieth. This defendant is advised and alleges that no right or any cause of action ever vested in the plaintiff in respect of such alleged subscriptions to the capital stock of the said pretended company.

Twenty-first. This defendant insists that if he was ever at any time subject to any liability or obligation in the premises such liability, obligation, or right of action in respect thereof is barred by the statute of limitations, and denying that he was ever under any liability at all in the premises. This defendant further insists and alleges that he is not and never was under any liability to contribute as assignee in respect of the alleged subscription any more than his just and *pro rata* share of such sum as might be necessary to discharge the lawful indebtedness of the said company as ascertained in a proper action for that purpose in and by a court of competent jurisdiction over all the creditors of the said company and over all of the stockholders of the said company and with full power, such creditors and stockholders being parties to the said action to adjust and to adjust and finally determine their respective rights and liabilities.

31 Twenty-second. This defendant further alleges that if the said plaintiff, the pretended trustee, as in the said complaint set forth, has any right, title, or interest in the premises whatsoever or his alleged predecessors in the said trust, the said plaintiff and his alleged predecessors in the pretended trust created by the pretended

assignment held and hold such right and title only in the interest and as a representative of the creditors or pretended creditors of the said National Express and Transportation Company and not in his own right or beneficially, and that the said plaintiff, as the agent and representative of such creditors, has no other or greater right, title, or cause of action in the premises than such creditors respectively have or could have. In this behalf this defendant, insisting and alleging that said pretended assignment, if made, was and is wholly void, further alleges that the delay, laches, and misconduct of the said creditors or pretended creditors and of the pretended trustees and agents in taking no proceedings against the said company in respect of their said debts, or for the appropriation of the assets of the said company to the payment thereof, or for carrying out and enforcing according to law the provisions of the said pretended deed of trust for about thirteen years, namely, from the month of September, 1866, to the month of August, 1879, has barred the said creditors of all equity or right of action in the premises as against this defendant; that this defendant, as hereinbefore stated, was not a party to and had no notice of the said pretended order of reference entered in the said action *ex parte* in the month of December, 1880, more than fourteen years after the said company had practically ceased to exist and more than fourteen years after the accruing of any indebtedness against the said company, and this defendant is advised and alleges that all the proceedings had under the said pretended order of reference are as to him void and of no effect; that the said chancery court of the said city of Richmond had no power or authority to make the said pretended calls, orders, or assessments upon the stockholders of the said company or their assignees for the
32 payment of the money, and particularly upon such of them as were without the jurisdiction of the said court, and upon the defendant, and that as to this defendant such pretended calls, orders, and assessments and each of them were and are wholly void and of no effect. Moreover, if this defendant had ever come under an obligation to pay any money in respect of any subscription for such shares of capital stock, payment thereof was due upon demand, and that long before any such demand or call had been made this defendant's liability to make such payment was barred by the statutes of limitations both of the State of Virginia, to which the said company was subject, and the statute of this State, as hereinbefore alleged; that the said pretended creditors did by themselves and their attorneys and by their said pretended trustee and representative and without the knowledge or consent of this defendant procure and consent to the said pretended order in the action aforesaid of July, 1883, authorizing the plaintiff to accept on behalf of the said creditors from one hundred and nine of such stockholders, holding altogether four thousand seven hundred and thirty-seven shares of the said capital stock, twenty-five per cent. of the amount of their respective subscriptions in full discharge of all liability in the premises; that it is unjust, inequitable, and contrary to law that the said creditors and the plaintiff, as their representative, should recover from the defendant the full amount of the said pretended subscrip-

tion, while releasing and discharging the other subscribers to the said capital stock in like situation upon the payment of one-fourth of the amount of such subscription, and the defendant is advised and insists that such release and discharge of itself operated as a release of this defendant from all liability in the premises whatsoever by preventing any equality among such subscribers in respect to their liability for such debts or pretended debts, and also by depriving this defendant of his just right of contribution if compelled to pay the amount demanded by the plaintiff or any other amount.

33 This defendant is advised and insists that any liability under which he came as an assignee of a subscription to the said capital stock, if any, was to the saidNational Express and Transportation Company and not otherwise; that such liability depended and was conditioned upon the commencement and carrying on of the business for which it was created, and to promote which the said subscription was made, and for no other purpose; that the total abandonment of its organization and business and the assignment of all its property and effects by the said company within a few months, namely, eight months, after its creation was a breach of the condition on which the said subscription was made and released and discharged this defendant from any and all obligation in the premises; that if any duty or liability was imposed by law upon this defendant growing out of the facts aforesaid and independent of the said contract of subscription to contribute in respect of the indebtedness of the said company, that liability did not and by law could not arise nor the amount thereof be ascertained until after the just application of all the property of the said company to the payment of its just debts, and that it was the duty of the creditors of the said company to proceed with diligence and according to law and within the time limited by law to compel such application; that no such application of the property of the said company was at any time made or demanded, and the plaintiff and the said creditors wholly neglected their duty in the premises, by reason whereof this defendant has long since been discharged from any and all liability; that such obligation to contribute, if any, rested upon all of such subscribers equally, and could not and cannot be ascertained, determined, and enforced except in and by a court having lawful jurisdiction of and over such stockholders, and this court has no such power or jurisdiction; that in respect to such liability to contribute his due and proper share for the payment of the debts of the said corporation there was no privity between this defendant and the said corporation, particularly after it had abandoned its business, assigned its property, and dissolved its

34 organization, nor between this defendant and the creditors of the said company, and this defendant is not bound or concluded by any pretended finding or adjudication in respect to the said debts in proceedings to which he was neither a party nor privy; that if liable in the premises at all, this defendant, as he is advised and insists, is entitled in an action to establish and enforce such liability to have the amount of the debts of the said company ascertained according to law, and has the right to contest in like

manner the existence and validity of any and all such pretended debts; that the creditors of the said company are not nor are any of them parties to this action, nor has this court any jurisdiction or power to ascertain the amount or validity of the said pretended debts or of any of them.

Twenty-third. This defendant denies that the said cause was duly removed into the circuit court for the county of Henrico, as alleged in the said complaint, and upon information and belief alleges that the said circuit court was and is wholly without jurisdiction in the premises, and that all its proceedings in the said cause were and are wholly void.

This defendant had no knowledge or notice of the said pretended removal.

Wherefore this defendant demands judgment that the complaint be dismissed with costs.

WM. C. CLOPTON,
Attorney for Defendant Garth,
No. 32 Nassau Street, N. Y. City.

STATE OF NEW YORK, }
City and County of New York } *ss:*

David J. Garth, being duly sworn, says that he is one of the defendants above named; that the foregoing answer is true
35 of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

D. J. GARTH.

Sworn to before me this 2d day of April, 1887.
RUSSELL A. BIGELOW,
Commissioner of Deeds, New York County.

Supreme Court, City and County of New York.

JOHN GLENN, Trustee, &c., Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, WELLINGTON GODDIN, JAMES L. APPERSON, ROBERT A. LANCASTER, and LEWIS GINTER, Defendants.

Separate Answer of Defendant Lancaster.

The said defendant, Robert A. Lancaster, answers the complaint in the above-entitled action as follows:

First. This defendant admits that the copartnership of Harrison, Garth & Co. did exist, but denies that it existed as alleged in the complaint. This defendant has no knowledge or any information sufficient to form a belief as to whether the said National Express and Transportation Company, mentioned in the second paragraph of the said complaint, was or is a corporation of the State of Virginia, duly incorporated, organized, and existing under the
36 laws of the said State, as in the said paragraph is alleged, and leaves the plaintiff to make such proof thereof as he may be

advised. This defendant denies that the said pretended corporation heretofore or at any time carried on the business of an express and transportation company, as in the said paragraph is alleged, except in the manner and to the extent hereinafter stated.

Second. This defendant, further answering, upon information and belief denies that the said firm of Harrison, Garth & Company, mentioned in the second paragraph of the said complaint, heretofore or at any time became the holders or owners of 490 shares of the capital stock of the said pretended corporation, the National Express and Transportation Company, by assignment and transfer from the original subscriber or subscribers for said shares or otherwise, and denies that the said alleged firm, at any time, became and were received and accepted by the said pretended corporation as stockholders in and members of the said corporation for 490 shares or any shares whatsoever of the capital stock of the said corporation, as in the said second paragraph is alleged.

Third. This defendant, further answering, upon information and belief denies the existence, at any time, of the pretended agreement set forth in the third paragraph of the complaint, and upon like information and belief denies each and every one of the allegations in the said third paragraph in the complaint contained.

Fourth. This defendant, further answering, upon information and belief denies each and every one of the allegations in the fourth paragraph of the complaint contained.

Fifth. This defendant, further answering, upon information and belief denies each and every one of the allegations contained in the fifth paragraph of the complaint.

37 Sixth. This defendant, further answering, alleges that he has no knowledge and no information sufficient to form a belief as to the truth of the allegations contained in the sixth, seventh, and eighth paragraphs of the said complaint, and leaves the plaintiff to make such proof thereof as he may be advised.

Seventh. This defendant, further answering, admits that he has not paid the sum of money specified in the ninth paragraph of the said complaint, and he denies every other allegation contained in the said paragraph.

Eighth. This defendant, referring to the plaintiff's alleged second cause of action in the said complaint set forth, and further answering, upon information and belief denies the allegations contained in the second paragraph of the said pretended second cause of action.

Ninth. This defendant denies upon information and belief the allegations contained in the third paragraph of the plaintiff's alleged second cause of action set for- in the said complaint.

Tenth. This defendant denies all the allegations in the said complaint not herein expressly admitted to be true.

For further several and separate defenses to the matters and things set forth in the said complaint, and to all and singular the allegations contained in the foregoing answer thereto, alleges:

First. This defendant, further answering, alleges that the said firm of Harrison, Garth & Co. were gold brokers and bankers carrying

on business in the city of New York at the time hereinafter mentioned, and that it was part of the business of the said firm to buy the stocks of corporations for the customers of the firm; that in the month of May, 1866, the said firm caused to be purchased for account of one of its customers four hundred and ninety shares
38 of the capital stock of the said National Express and Transportation Company, being the same shares mentioned in the complaint, at the board of brokers in the city of Baltimore in the regular course of business.

This defendant alleges that he did not and upon information and belief that the said firm did not transfer nor cause or authorize to be transferred into the name of the said firm the stock so purchased for said customer, and by whom and not the said firm the said stock was owned; and this defendant further alleges that if any such transfer was in fact made it was made fraudulently and without authority, and was and is void as against this defendant.

This defendant further alleges on information and belief that by the authority or direction of the said customer for whom the said shares were purchased as aforesaid the said four hundred and ninety shares of stock were sold at the said board of brokers in the city of Baltimore on the 10th day of August, 1866.

This defendant is further informed and believes that if the said shares were not transferred on the books of the said company and into the name of the purchaser it was because its transfer books had at that time been closed and such transfer was not possible.

This defendant denies that either he or his said firm were ever the owners of the said shares, or that the same were ever registered in its name upon the books of the said company with the authority or by permission of the said firm.

Second. That the pretended causes of action stated in the complaint did not nor did either of them accrue within six years before the commencement of this action.

Third. This defendant is informed and believes that on or about the 16th day of January, 1866, certain persons, associating
39 themselves together under the name of the National Express and Transportation Company, pretended, by virtue of such association, to be a corporation under that name; that the said association or corporation remained in existence only until the 20th day of September, 1866, a few months after its organization, when it practically ceased to exist, and has never since performed any corporate acts or exercised any corporate functions; that, at about the date last aforesaid, all the officers of the said corporation resigned their respective offices, and none were ever elected in their places; that on the date last above-mentioned the said company, under a pretended assignment of the terms and provisions of which this defendant has no knowledge, transferred and delivered all its property to three persons upon some pretended trust—namely, John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell.

Fourth. This defendant is further informed and believes that the said National Express and Transportation Company pretended to have authority to issue capital stock to the amount of five millions

of dollars in shares of one hundred dollars each, and that between the date of its organization, on the 16th of January, 1866, and the transfer of its property and practical dissolution, on the 20th of September following, it had opened books of subscription for such shares; that over one thousand persons had subscribed for such shares, their subscriptions amounting in the aggregate to 43,556 shares; that such subscribers resided in many and widely separated States of the United States and that but a small number thereof were or are residents of this State or within the jurisdiction of this court.

Fifth. This defendant upon information and belief further alleges that the aforesaid subscriptions to capital stock were payable by the subscribers upon the demand of the company, and that prior to the said 20th day of September, 1866, the said company had demanded of each subscriber the payment of twenty per cent. upon
40 each subscription—equivalent to twenty dollars per share—such demand amounting in the aggregate to $871,120, whereof, as this defendant is informed and believes, about the sum of $500,000 was paid, and that subscribers, to the amount in the aggregate of three hundred and fifty thousand dollars or over, failed to comply with such demand, and that no measures have ever been taken to enforce their liability in that behalf, and that such liability in every case has been long since barred and extinguished by the statute of limitations, which, as this defendant is advised and alleges, commenced to run as against the said company and its representatives and in favor of the several subscribers to the capital stock of the said company from the date of the respective subscriptions thereto.

Sixth. This defendant, further answering, on information and belief alleges that, after the organization of the said National Express and Transportation Company, as hereinbefore stated, the company, having realized from its stock subscriptions and the assessment above mentioned more than five hundred thousand dollars, acquired a considerable plant and property for its business and actually commenced to carry on its express and transportation business to a limited extent; and at the time of the abandonment of the enterprise for which the company was created and the transfer of its property the available property and assets of the company exceeded in value the amount of its then outstanding indebtedness.

Seventh. This defendant upon information and belief further alleges that the said pretended assignees and trustees, Hoge, Kelly, and O'Donnell, never made or filed any inventory of the property of the said company so transferred to them as aforesaid, and never made or rendered any account of their pretended trust in the premises, and were never called to account by any person whatsoever in any court or otherwise; that the property of the said company so transferred as aforesaid and applicable to the payment of
41 its debts was fraudulently misappropriated and misapplied by the said pretended trustees to their own use or wasted and misappropriated in other ways unknown to this defendant, and that this plaintiff, the pretended successor in interest and title of

the aforesaid pretended trustees, has never rendered any account of the said property or taken any measures to obtain the same or the proceeds thereof and for the application thereof to the payment of the debts of the said pretended corporation.

Eighth. This defendant is advised and alleges that the contract, if any, was on the part of the subscriber a contract to pay the amount of the subscription upon the demand of the company therefor, and on the part of the company to proceed with due diligence and according to law to prosecute and carry out the enterprise in respect to which such subscription was made, and that the liability of each and every subscriber was dependent upon the performance by the company of its own undertaking in the premises, and that, upon the transfer by the said company of all its property to the said pretended trustees above mentioned and the total abandonment of the enterprise and business for which it was created and organized and for the promotion and prosecution of which such subscriptions were made and the practical dissolution of the said corporation, the contract obligation of the subscribers to such capital stock, and of each of them, was abrogated and thereupon ceased to exist; that if any liability whatsoever in the premises continued thereafter to exist as against the said subscribers it was limited and restricted to an obligation to contribute ratably and in proportion to their several subscriptions so much money as might be necessary to discharge the outstanding indebtedness of the company after the due application of the property and assets of the company, if called upon and required within due time and in due course of law to make such ratable subscription by the order of decree of a court of competent jurisdiction in the premises in respect of the parties and sub-
42 ject-matter, with power to adjust, determine, and enforce the respective rights and obligations of all parties.

Ninth. In this behalf this defendant is advised and further alleges that if ever liable in any manner or form in respect of any subscription as alleged in the complaint that obligation, if any, existed and continued only for the period of five and at most six years from the date of the original subscription, which period has long since elapsed; and, further, that such liability, if any, was only in respect of any indebtedness that might remain after the just application by the plaintiff or his predecessors in office as pretended trustees of all the property of the said company to the payment of its debts, and in respect of any balance of such indebtedness that might remain after such application to only so much thereof as might appear, upon a just and proper accounting, to be this defendant's due proportion of the common liability attaching to all subscribers in respect of the premises. This defendant is moreover advised and alleges that any such subscriber who was required to pay or had payed more than his due proportion of the sum necessary to provide for such indebtedness would have a just right of contribution as against any other subscriber who has paid less than his due proportion, and that the subscriber so entitled to contribution would stand in the relation of surety to the subscriber or subscribers liable to such contribution; that, as hereinafter more at large set forth,

the plaintiff now in this action seeking to recover from this defendant the full amount of his alleged liability has released and discharged a large proportion of the subscribers to the said capital stock at a nominal percentage of their respective subscriptions—that is to say, 20 or 25 per cent. of the amount thereof.

Tenth. This defendant alleges upon information and belief that there has never been any accounting in any court in respect of the property transferred by the said company to the said pre-
43 tended trustees, Hoge, Kelly, and O'Donnell; that there has never been any accounting or judicial inquiry in respect to the amount of the indebtedness of the said company; that there has never been any accounting or inquiry in respect to the liability of the several subscribers to the stock of the said company for and in regard to the said indebtedness, and that for the reasons hereinafter at large stated this court is without any power or jurisdiction in the premises in respect to such accounting and the determination and adjustment of such liability, if any.

Eleventh. This defendant upon information and belief further alleges that Hoge, O'Donnell, and Kelly took no action in the premises in respect to the execution of their said trust, and that in the month of November, 1871, more than five years after the said pretended assignment, one W. W. Glenn brought a suit in the chancery court of the city of Richmond, in the State of Virginia, against William H. Perot and certain other persons, among them Joseph R. Anderson and M. G. Harmon, praying for a subpœna against the said Perot and others, and in his prayer for relief demanding, among other things, an account of the debts and assets of the said company, and for an accounting on the part of the said alleged trustees, Hoge, O'Donnell, and Kelly; that such an assessment as might be necessary to obtain money for the payment of any balance of the indebtedness of the company to creditors might be made upon the subscribers to the stock of the company, and that the board of directors of the said company might be required to levy such assessments; that the pretended trust deed might be construed by the court, for the appointment of a receiver, and for other relief. The said National Express and Transportation Company was not a party to the said suit, and a subpœna issued therein, as appears by the return endorsed by the proper officer, was served upon Joseph R. Anderson on the 25th of November, 1871, and upon M. G. Harmon on the 28th of November, 1871, and upon no other person or persons. There were no appearances in the said
44 cause, either by or on behalf of the persons so served or any other nominal defendant, nor were there any other proceedings had in the said cause until the month of August, 1879. Before the date last mentioned the plaintiff Glenn had deceased and one John W. Wright, by virtue of his office of sheriff of the city of Richmond and of the laws of the State of Virginia on that behalf, became the administrator of the estate of the said Glenn, the plaintiff in the said suit, about eight years after the commencement thereof, during which period, as above stated, no proceedings whatever had been taken therein.

Twelfth. This defendant on information and belief further alleges that in or about the month of August, 1879, the said Wright, as such administrator as aforesaid, appeared in the said suit and filed an amended and supplemental complaint therein. To this supplemental complaint the said National Express and Transportation Company was made a nominal party by a prayer for subpœna, as well as the pretended president and directors before mentioned. Of the nominal defendants the said Anderson and one Lorenzo Norvell, a pretended director, were alone residents of the State of Virginia, and a subpœna was served upon those persons respectively and upon one M. B. Poitiaux, the latter being alleged to be or to have been the cashier and treasurer of the said company. Afterwards, in the month of September, 1879, the said Poitiaux entered an appearance in the said suit and filed an answer therein denying that he was an officer of the company and denying and disclaiming any representative capacity, duty, or liability in the premises. In the following month of October the said Anderson also entered an appearance in the said suit and filed an answer therein denying that he was a director and officer of the said company and disclaiming all responsibility in the premises. The said National Express and Transportation Company was never served with process in the said suit and never appeared. The said chancery court of the city of Rich-
45 mond never acquired any jurisdiction of the said corporation, and, as this defendant is advised and alleges, all the subsequent proceedings in the said action as against the said company were wholly without jurisdiction and void.

Thirteenth. Before the commencement of the suit in the preceding paragraph mentioned the pretended trustee O'Donnell had deceased. The pretended trustees Hoge and Kelly, having then been made defendants, appeared in the said suit and filed their answers. This defendant is informed and alleges that at the date of the commencement of the said suit the said Hoge was a resident of the State of West Virginia, and therefore not within the jurisdiction of the said chancery court of the city of Richmond, and the said Kelly was a resident of the State of New York and without the jurisdiction, and no service of process in the said suit had been made or could have been made upon the said the last-mentioned defendants which would have subjected them to the jurisdiction of the said court for the purpose of any order or decree that might be made in the said suit. This defendant is further informed and believes that by a fraudulent and collusive arrangement between the plaintiff in the said suit and the said Hoge and Kelly the two persons last mentioned were induced to voluntarily enter their appearance in the said suit and to ask for their own discharge by the payment of a large sum of money to them by the plaintiff and a promise made to them by the plaintiff of protection and immunity for their neglect, fraud, and misconduct in respect to the execution of their pretended trust under the before-mentioned assignment of the said company and in respect to the assets and property received by them or which ought to have been collected and properly administered

by them under such assignment and their disposition and misappropriation of the said property.

Fourteenth. This defendant upon information and belief
46 further alleges that after the filing of the said amended and supplemental bill of complaint by the administrator Wright, in the year 1879, and after the fraudulent and collusive appearance of the surviving alleged trustees, obtained in the manner and for the consideration above mentioned, sundry *ex parte* interlocutory proceedings were nominally had in the said suit, the said National Express and Transportation Company not being a party thereto, and none of the officers or directors of said company appearing or in any manner contesting, and none of the stockholders of the said company or alleged subscribers to the capital stock thereof being parties to the said suit or in any manner appearing or intervening therein. Among other things:

1. In the month of December, 1880, an order was entered removing the said Hoge and Kelly from their pretended office of trustees and appointing in their place and stead John Glenn, the plaintiff in this action.

2. There was a certain reference to a so-called commissioner, but no accounting or inquiry was directed or had in respect to the amount or disposition of the assets of the company which came or ought to have come into the possession of the said O'Donnell, Hoge, and Kelly, trustees, nor as to the disposition thereof. No inquiry was had or taken as to the validity or amount of the debts of the said company, nor has any judicial inquiry upon evidence ever been had as to the assets and property of the said company nor as to the indebtedness of the company, nor was any inquiry or determination had or directed as to the liability in the premises of the respective subscribers to the stock of the said company.

Fifteenth. Among other *ex parte* interlocutory proceedings had in the said suit, the plaintiff in this suit, John Glenn, the pretended substituted trustee, obtained from the said chancery court of the city of Richmond, in the month of July, 1883, an order authorizing and empowering him to compromise and settle the alleged lia-
47 bility in the premises of certain stockholders upon the payment by them of twenty-five cents on the dollar of the amount of their respective subscriptions for stock.

The plaintiff, in pursuance of the said order so obtained by him, received from 109 different stockholders, whose holdings in the aggregate amounted to 4,737 shares, the said percentage, and thereupon released and discharged them and each of them from all liability in the premises, acquitting each and all of them from liability to contribute their just and *pro rata* share necessary for the payment of the debts of the said company and depriving this defendant of all rights to contribution in the event of being compelled to pay to the plaintiff the amount demanded in this action; and this defendant is advised and alleges that this court is without power or jurisdiction in respect of the subject-matter or persons necessary to be dealt with in the premises in order to reverse, annul, and set aside the *ex parte* fraudulent and collusive proceedings of the plaintiff in

obtaining the release and discharge of a large proportion of the subscribers of the capital stock of said company upon the payment of a nominal percentage of their liability as such subscribers, while at the same time demanding in this action the payment by this defendant of the full amount of the alleged liability of the original subscriber or subscribers to the said capital stock, to whose liability it is pretended that this defendant has succeeded; and this defendant is advised and alleges that the plaintiff, by his conduct aforesaid, is estopped and precluded from maintaining this action to enforce his pretended demand against this defendant is respect of the premises. In this behalf this defendant further alleges that in respect of a part of the said original subscription the plaintiff, in pursuance of the said collusive and fraudulent order in the premises, accepted and received from the alleged original subscriber in respect of his subscription 25 per cent. upon the amount of stock subscribed for and embraced in the action not alleged to have been transferred by him to this defendant's firm or copartnership.

48 Sixteenth. This defendant alleges that he was not a party to the aforesaid action in the chancery court of the city of Richmond in person or by representation, and he is advised and alleges that he is not affected nor in any manner bound or concluded by any of the proceedings therein. This defendant further alleges that all of the said proceedings have been merely interlocutory and not final, and have been had and conducted *ex parte* under the sole direction of the plaintiff and his attorneys; that the pretended interlocutory judgment against the said National Express and Transportation Company was taken by default without any service of process upon or appearance by the said company.

Seventeenth. This defendant upon information and belief further alleges that no valid judgments have ever been recovered against the said pretended corporation, the said National Express and Transportation Company, in respect of any of its pretended indebtedness; that such indebtedness has never been established against the said corporation by any evidence in any local proceeding; that the reports made from time to time in respect thereof were procured to be made by fraud and collusion between the plaintiff in this action and attorneys pretending to represent creditors, who were at the same time in the service of this plaintiff, sharing under certain terms of distribution, the exact terms thereof being unknown to this defendant, the money extorted by threats, persuasion, or under color of legal proceedings from alleged subscribers to the stock of the said pretended National Express and Transportation Company; and, further, that all of the said pretended debts of the said corporation have long since been barred by the statute of limitations of the State of Virginia.

Eighteenth. This defendant upon information and belief alleges and charges that the said pretended action in the chancery court of the city of Richmond has been from the beginning and is

49 now prosecuted in bad faith, fraudulently and collusively, and not for the purpose of compelling an equal and *pro rata* contribution from the alleged subscribers to the alleged capital

stock or their assignees of such an amount as might be necessary to pay the just and established debts of the said corporation, but solely for the purpose of extorting and obtaining money to be distributed under the name of fees and expenses between the plaintiff and his associates in the enterprise; and, further, that all or nearly all of the collections, amounting to a large sum, hitherto extorted through the instrumentality of the said pretended action, has been so apportioned and distributed.

Nineteenth. This defendant is advised and alleges that the said chancery court of the city of Richmond had not at any time any power or jurisdiction to make the pretended call, order, or requirement for payments in respect to subscriptions to the said capital stock, and particularly to make such call or order upon this defendant, who was not and is not a party to the said action nor within the jurisdiction of the said court, and that the said court has been and is without power or jurisdiction to create and impose any duty or obligation upon or cause of action against this defendant by its orders and decrees in the said action.

Twentieth. This defendant is advised and alleges that no right or any cause of action ever vested in the plaintiff in respect of such alleged subscriptions to the capital stock of the said pretended company.

Twenty-first. The defendant insists that if he was ever at any time subject to any liability or obligation in the premises, such liability, obligation, or right of action in respect thereof is barred by the statute of limitations, and also insists that any right of action growing out of any indebtedness of the National Express and Transportation Company is also barred by the statute of limitations; and, denying that he was ever under any liability at all in the premises, this defendant further insists and alleges that he is not and never was under any liability to contribute as assignee in respect of the alleged subscription any more than his just *pro rata* share of such sum as might be necessary to discharge the lawful indebtedness of the said company as ascertained in a proper action for that purpose in and by a court of competent jurisdiction over all the creditors of the said company and over all of the stockholders of the said company, and with full power, such creditors and stockholders being parties to the said action, to adjust and finally determine their respective rights and liabilities.

Twenty-second. This defendant further alleges that if the said plaintiff, the pretended trustee as in the said complaint set forth, has any right, title, or interest in the premises whatsoever or his alleged predecessors in the said trust, the said plaintiff and his alleged predecessors in the pretended trust created by the pretended assignment held and hold such right and title only in the interest and as the representatives of the creditors or pretended creditors of said National Express and Transportation Company and not in his own right or beneficially, and that the said plaintiff, as the agent and representative of such creditors, has no other or greater right, title, or cause of action in the premises than

such creditors respectively have or could have. In this behalf this defendant, insisting and alleging that said pretended assignment, if made, was and is wholly void, further alleges that the delay, laches, and misconduct of the said creditors or pretended creditors and of the pretended trustees and agents in taking no proceedings against the said company in respect of their said debts, or for the appropriation of the assets of the said company to the payment thereof, or for carrying out and enforcing according to law the provisions of the said pretended deed of trust for about thirteen years, namely, from the month of September, 1866, to the month of August, 1879, had barred the said creditors of all equity or right of action in the premises as against this defendant; that this defendant, as
51 hereinbefore stated, was not a party to and had no notice of the said pretended order of reference entered in the said action *ex parte* in the month of December, 1880, more than fourteen years after the said pretended assignment and more than fourteen years after the said company had practically ceased to exist and more than fourteen years after the accruing of any indebtedness against the said company, and this defendant is advised and alleges that all the proceedings had under the said pretended order of reference are as to him void and of no effect; that the said chancery court of the said city of Richmond had no power or authority to make the said pretended calls, orders, or assessments upon the stockholders of the said company or their assignees for the payment of money, and particularly upon such of them as were without the jurisdiction of said court and upon the defendant, and that as to this defendant such pretended calls, orders, and assessments and each of them were and are wholly void and of no effect. However, if this defendant ever came under an obligation to pay any money in respect of any subscription for such shares of capital stock payment thereof was due upon demand, and that long before any such demand or call had been made this defendant's liability to make such payment was barred by the statutes of limitations, both of the State of Virginia, to which the said company was subject, and the statute of this State, as hereinbefore alleged; that the said pretended creditors did, by themselves and their attorneys and by their said pretended trustee and representative and without the knowledge or consent of this defendant, procure and consent to the said pretended order in the action aforesaid of July, 1883, authorizing the plaintiff to accept on behalf of the said creditors from one hundred and nine of such stockholders, holding altogether four thousand seven hundred and thirty-seven shares of the said capital stock, twenty-five per cent. of the amount of their respective subscriptions in full discharge of all liability in the premises; that it is unjust,
52 inequitable, and contrary to law that the said creditors and the plaintiff, as their representative, should recover from the defendant the full amount of the said pretended subscription, while releasing and discharging the other subscribers to the said capital stock in like situation upon the payment of one-fourth of the amount of such subscription, and the defendant is advised and insists that such release and discharge of itself operated as a release of this de-

fendant from all liability in the premises whatsoever by preventing any equality among such subscribers in respect to their liability for such debts or pretended debts, and also by depriving this defendant of his just right of contribution if compelled to pay the amount demanded by the plaintiff or any other amount. This defendant is advised and insists that any liability under which he came as an assignee of a subscription to the said capital stock, if any, was to the said National Express and Transportation Company and not otherwise; that such liability depended and was conditioned upon the commencement and carrying on of the business for which it was created, and to promote which the said subscription was made, and for no other purpose; that the total abandonment of its organization and business and the assignment of all its property and effects by the said company within a few months, namely, eight months after its creation, was a breach of the condition on which the said subscription was made, and released and discharged this defendant from any and all obligation in the premises; that if any duty or liability was imposed by law upon this defendant growing out of the facts aforesaid and independent of the said contract of subscription to contribute in respect of the indebtedness of said company that liability did not and by law could not arise nor the amount thereof be ascertained until after the just application of all the property of the said company to the payment of its just debts, and that it was the duty of the creditors of the said company to proceed with diligence and according to law and within the time limited by law to compel such application; that no such application of the property of the said company
53 was, at any time, made or demanded, and the plaintiff and the said creditors wholly neglected their duty in the premises, by reason whereof this defendant has long since been discharged from any and all liability; that such obligations to contribute, if any, rested upon all of such subscribers equally, and could not and cannot be ascertained, determined, and enforced except in and by a court having lawful jurisdiction of and over such stockholders, and this court has no such power or jurisdiction; that in respect to such liability to contribute his due and proper share for the payment of the debts of the said corporation there was no privity between this defendant and the said corporation, particularly after it had abandoned its business, assigned its property, and dissolved its organization, nor between this defendant and the creditors of the said company, and this defendant is not bound or concluded by any particular finding or adjudication in respect to the said debts in proceedings to which he was neither a party nor privy; that if liable in the premises at all this defendant, as he is advised and insists, is entitled in an action to establish and enforce such liability, to have the amount of the debts of the said company ascertained according to law, and has the right to contest in like manner the existence and validity of any and all such pretended debts; that the creditors of the said company are not, nor are any of them, parties to this action, nor has this court

any jurisdiction or power to ascertain the amount or validity of the said pretended debts or of any of them.

Twenty-third. This defendant denies that the said cause was duly removed into the circuit court for the county of Henrico, as alleged in the said complaint, and upon information and belief alleges the said circuit court was and is wholly without jurisdictiction in the premises, and that all its proceedings in the said cause were and are wholly void. This defendant had no knowledge or notice of the said pretended removal.

54 Wherefore this defendant demands judgment that the complaint be dismissed with costs.

REYNOLDS & HARRISON,
Attorneys for Defendant, 59 Wall Street, New York.

STATE OF NEW YORK, *City and County of New York,* } ss.:

Robert A. Lancaster, being duly sworn, says that he is one of the defendants above named; that the foregoing answer is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

R. A. LANCASTER.

Sworn to before me this 5th day of April, 1887.
WILLIAM J. CAMPBELL,
Notary Public (10), *New York City and County.*

Supreme Court, City and County of New York.

JOHN GLENN, Trustee, &c., Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, Wellington Goddin, James L. Apperson, Robert A. Lancaster and Lewis Ginter, Defendants.

Separate Answer of Defendant Samuel J. Harrison.

(The separate answer of the defendant Samuel J. Harrison
55 is identical with that of the defendant David J. Garth; and it is stipulated and consented by all parties that it need not be set forth at length in the printed case.)

BURTON N. HARRISON,
Attorney for Plaintiff.
WM. C. CLOPTON,
Attorney for Defendant Garth.
REYNOLDS & HARRISON,
Attorneys for Defendant Lancaster.
JOHN R. ABNEY,
Att'y for Def't Samuel J. Harrison.

Supreme Court, Circuit Part II, March 25th, 1890.

JOHN GLENN *against* DAVID J. GARTH *et al.* } Extract from Minutes. Clerk's Certificate.

Present: Hon. Edward Patterson, justice.

I hereby certify that this cause was this day tried by the court and a jury and a verdict rendered therein by direction of the court in favor of the plaintiff for the sum of $30,641.50; exceptions to be heard in the first instance at the general term.

EDWARD F. REILLY, *Clerk.*

H. C. R.

56 At a circuit court, part II, held in and for the county of New York, at the county court-house, in the city of New York, on the 25th day of March, 1890.

Present: Hon. Edward Patterson, a justice.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff, *against* DAVID J. GARTH, ROBERT A. LANCASTER, and Samuel J. Harrison, Impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter, Defendants. } Order that the Exceptions be Heard in the First Instance at the General Term.

The issues in this cause having been brought to trial at this circuit court, part II, held in and for the county of New York, and having been this day tried by the court and a jury, and a verdict having been rendered therein by direction of the court in favor of the plaintiff and against the defendants David J. Garth, Robert A. Lancaster, and Samuel J. Harrison for the sum of thirty thousand six hundred and forty-one $\frac{50}{100}$ ($30,641.50) dollars, and the said defendants against whom said verdict was so rendered having taken exceptions to said direction of the verdict and to rulings made on the trial, and having now applied for an order that the
57 exceptions so taken be heard in the first instance at the general term, and that judgment be suspended in the meantime—

Now, therefore, after hearing Wm. W. Macfarland, Esq., of counsel for said defendants Garth and Lancaster, and John R. Abney, Esq., of counsel for said defendant Harrison, in support of said application, and hearing also John Howard, Esq., of counsel for the plaintiff, in opposition, and due consideration having been had, it is—

Ordered that the exceptions be heard in the first instance at the general term, and that judgment be suspended in the meantime.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of, &c., the National Express and Transportation Company, Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, and Robert A. Lancaster, Impleaded with Others, Defendants.

Case Containing Exceptions.

The issues in this action came on for trial at a circuit court, part II, held at the city of New York, in and for the county of New York, on the 24th day of March, 1890, before Hon. Edward Patterson, a justice of the supreme court, duly assigned to hold said circuit court.

Appearances: Burton N. Harrison and John Howard, Esquires, of counsel for the plaintiff; William C. Clopton and Robert
58 L. Harrison, Esquires, of counsel for the defendants David J. Garth and Robert A. Lancaster respectively, and with them William W. MacFarland, Esquire, of counsel for said defendants; John R. Abney, Esquire, counsel for defendant Samuel J. Harrison.

A jury was called and sworn, and the plaintiff, by John Howard, Esquire, of counsel for him, opened the case.

The plaintiff then, to maintain the issues upon his part, called as a witness—

SAMUEL J. HARRISON, one of the defendants, who was sworn as a witness for plaintiff, and, upon direct examination by BURTON N. HARRISON, Esquire, of counsel for plaintiff, testified as follows:

Q. Where do you reside?
A. New York.
Q. How long have you resided in New York?
A. About twenty-five years.
Q. Were you carrying on business in the city of New York in 1866 and afterwards?
A. Yes, sir.
Q. Were you a member of a firm?
A. Yes, sir.
Q. What was the style of that firm?
A. In 1865 and part 1866 I was a member of the firm of Harrison, Garth & Co.
Q. Have you the articles of association of that copartnership?
A. I have.
Q. I ask you to produce them.

Produced by witness.

Q. Is the paper which you have just produced the original articles of association of that firm?
A. Yes, sir.
Q. Those are the original signatures of the several members of the firm?

59 A. Yes, sir; except in the case of one blank which you will see there.

Q. Why was that blank left?

A. The man was in debt and being sued at the time, and he asked not to be forced to sign at the time the others signed.

Q. Who was that?

A. Lewis Ginter.

Q. Whose handwriting is that paper, except the signatures (handing witness paper)?

A. Mr. Garth's.

Q. Is that Mr. Garth's signature—the second signature?

A. Yes, sir.

Q. And the last signature—is that Mr. Robert A. Lancaster's?

A. Yes, sir.

Plaintiff's counsel offers the paper in evidence and asks to have it marked.

DEFENDANTS' COUNSEL: For what purpose?

PLAINTIFF'S COUNSEL: The paper is offered in evidence for the purpose of showing the members of the firm of Harrison, Garth & Co. and they are the defendants in this action.

By the COURT:

Q. Those were the articles under which the business was conducted?

A. Yes, sir.

DEFENDANTS' COUNSEL: Is it offered in evidence for the purpose of showing that Mr. Ginter was a member of the firm as well as the others?

PLAINTIFF'S COUNSEL: It is offered for just exactly what its recitals are; that it shows the defendants in this action to have been members of the firm of Harrison, Garth & Company, as alleged in the complaint.

DEFENDANTS' COUNSEL: I object to the introduction of the
60 paper in evidence, as it appears not to have been executed, and that it is an imperfect instrument.

Objection overruled and defendant excepts.

Paper then read in evidence and marked Exhibit A as follows:

PLAINTIFF'S EXHIBIT A, C. B. C.

Whereas David J. Garth, of the city of New York, is this day admitted as an equal partner in the concern of Harrison, Goddin & Apperson, in the city of Richmond, State of Virginia, and Harrison & Co., in the city and State of New York, for the term of five years from the first day of June, 1865, he, the said Garth, having contributed a sum equal to the estimated value of the profits of each partner in said firms, made since 3d day of April last, to wit, the sum of

seven thousand dollars, and contributed to the capital of said firm the sum of fifty thousand to one hundred thousand dollars, as may be convenient or desirable to him, the s'd Garth; the other partners also to contribute to the capital of said firms as they are able to realize on their assetts or otherwise sums as near as may be equal to the amount contributed by s'd Garth; in order, however, to equalize, each partner is to be allowed interest at the rate of seven per cent. per annum on the money each has contributed or may contribute to the capital of said firms; and whereas Lewis Ginter, now of said city of New York, has an interest of one-fourth in the said firm of Harrison & Co.; in lieu thereof said Ginter, who contributes the sum of ten thousand dollars, is entitled to one-twelfth interest in the two said firms from the 3d day of April last:

Now, therefore, this agreement, made & entered into this 6th day of November, A. D. 1865, between Samuel J. Harrison, David J. Garth, & Lewis Ginter, of the said city of New York; Wellington Goddin, James L. Apperson, and Robert A. Lancaster (representing the firm of Lancaster & Co.), of the said city of Richmond, witnesseth:

That they do severally bind themselves, each to the other,
61 to abide by & carry out to the best of their ability the foregoing stipulation, to devote their time, talents, and energy to the prosecution of the business of bankers and real-estate auctioneers in said city of Richmond under the firm of Harrison, Goddin and Apperson, and of bankers in the said city of New York under the firm of Harrison, Garth & Co.

The capital of said firms to be used either at Richmond or New York as exigencies or interest may require.

The nature of the business may be altered or amended at either place by agreement of the parties hereto.

It is further agreed that in the event of the death of either partner the business may be continued to the next succeeding first of June when his interest may be ascertained by winding up the concerns or otherwise, as may be agreed on by the survivors and the personal representative of the decedent.

It is understood between the parties hereto that accom-odation endorsements shall not be made by any member or by either of said firms without the written consent of the members thereof.

Witness the following signatures & seals.

SAM'L J. HARRISON.	[SEAL.]
D. J. GARTH.	[SEAL.]
——— ———.	[SEAL.]
W. GODDIN.	[SEAL.]
J. L. APPERSON.	[SEAL.]
RO. A. LANCASTER.	[SEAL.]

By counsel for plaintiff:

Q. Do you know David J. Garth personally?
A. Yes, sir.
Q. Do you see him in the court-room?
A. I do.
Q. Point him out please.

(Mr. Garth being requested to stand up, did so.)

A. That is the gentleman.

Q. The same David J. Garth is a defendant in this action with you, is he?

62 A. Yes, sir.

Q. Do you know Robert A. Lancaster?

A. I do.

Q. Is the Robert A. Lancaster mentioned here the same Robert A. Lancaster who is a codefendant with you in this action?

A. Yes, sir.

Q. The signatures of Wellington Goddin and J. L. Apperson, are those the original signatures of those two persons (handing witness paper)?

A. Yes, sir.

Q. Did all those persons participate in the actual conduct of the business of Harrison, Garth & Co.?

A. Not those residing at Richmond.

Q. Those residing elsewhere?

A. Those residing in New York participated in the management of the business here of Harrison, Garth & Company.

Q. Then all of the several persons named in that paper participated in the actual conduct of the business either in Richmond, Virginia, or New York?

A. Yes, sir.

Q. How long did that business continue?

A. It continued, I think, from—in October Garth came in, but the instrument was dated back to June for some reason—I think to equalize Mr. Garth's interest in the business. Then I think the dissolution took place in 1868.

Q. The firm went into liquidation, did it?

A. The firm dissolved.

Q. What time in 1868, do you recollect?

A. I think in January. I have a paper with me which will show what time it was dissolved.

Q. What became of the books of account and of the daily entries of the firm of Harrison, Garth & Company?

A. At the time of the dissolution?

Q. Yes.

A. They were turned over to Mr. Garth.

Q. The defendant David J. Garth?

A. Yes, sir.

63 Q. Did he have possession of them after that?

A. Yes, sir.

Q. Did you see them after that, or any of them?

A. I saw them at the time of the dissolution in the iron safe, where all the books of account were kept.

Q. Did you see them after that?

A. I have no recollection of having seen them after that.

Q. Those were all the current books of account of the firm, were they?

A. Yes, sir.
Q. Who signed the name of the firm in liquidation here?
A. Mr. David J. Garth.
Q. Do you know where those books are now, or any of them?
A. No, sir.
Q. Have you ever seen them since they were left in the custody of Mr. Garth at the time of the dissolution of the firm?
A. No, sir.

PLAINTIFF'S COUNSEL: We have called upon the other side to produce those books. I repeat that call now, and ask to have those books produced.

DEFENDANTS' COUNSEL: We cannot produce them.

Q. Did those books show any assets of the firm of Harrison, Garth & Company?
A. Yes, sir.
Q. Assets of any value?
A. Yes, sir.
Q. Were they a full and complete record of the daily business transactions of the firm?
A. They were.
Q. Do you know whether any of those assets shown by those books were collected by Mr. Garth?
A. Yes, sir.
Q. What, for instance?
64 A. We had a claim against some parties in New Orleans—Riggin & Company.

Defendants' counsel objects to the question as irrelevant. Objection sustained.

When cross-examined by Mr. MACFARLAND, of counsel for defendants, the witness testified as follows:

Q. Are you correct in your statement as to the date of the dissolution of your firm?
A. I must refer to a paper to see whether I am or not.
Q. I think you said it was dissolved in 1868?
A. I think so.
Q. Let me refresh your recollection. Was it not in 1866?
A. No, sir.
Q. Refresh your recollection from anything you can.
A. (Witness referring to a paper:) February 1st, 1867. I made a mistake as to the time.
Q. What time in 1867?
A. February 1st, 1867. I have a copy here of the dissolution, and that is the date of it. It is so long ago that I did not recollect it.
Q. I believe you are one of the defendants in this action?
A. I am.

PLAINTIFF'S COUNSEL (to witness): Let me see that paper you are referring to.

(Paper handed to plaintiff's counsel.)

Upon redirect examination by counsel for plaintiff the witness testified as follows:

Q. Where is the original of that paper?
A. I do not know.
Q. Was it signed in duplicate or only a single signature to a single original?
A. I do not remember.
65 Q. Do you remember whether you kept the original signatures to an original paper at the time of the dissolution of the firm?
A. I do not remember.

Plaintiff's counsel calls upon the defendants to produce the original paper.
(The paper was not produced.)

Q. In whose handwriting is that paper you handed me?
A. That is Mr. David J. Garth's handwriting.
Q. Look at it closely again.
A. Yes, sir; that is Mr. Garth's handwriting.
Q. Not the whole paper, is it?
A. Yes, sir; the whole paper is Mr. Garth's.

Paper marked "Exhibit B" as follows:

EXHIBIT B, C. B. C.

Office of Garth, Fisher & Hardy, bankers, 18 New street.

NEW YORK, *February* 1*st*, 1867.

The subscribers, composing the firm of Harrison, Garth & Co., in the city of New York, and Harrison, Goddin & Apperson, in the city of Richmond, hereby mutually consent to a dissolution of said firms as entered into by articles of copartnership bearing date 6th day of November, 1865.

David J. Garth, who remains in New York, agrees to wind up the business there with all convenient dispatch consistent with realizing as much as possible from the debts due the firm of Harrison, Garth & Co., and who only will use the name of said firm and that only in liquidation.

Sam'l J. Harrison, W. Goddin, and Jas. L. Apperson will reside in Richmond, and will in like manner wind up the business
66 there, either of whom will use the name of said firm of Harrison, Goddin & Apperson and that only in liquidation.

Each partner hereby binds himself to pay within six months from this date, or before, if possible, any balance due from him to either of said firms, and also to pay his proportion of any loss which, upon settling up, may appear to be due from him. As the assets of the Richmond firm may not be realized fast enough to meet demands upon it, the said Garth hereby agrees to advance, by loan or

discounts of negotiable paper, such sum or sums as may be needed, not to exceed at any time the aggregate of $20,000; good bills receivable or other good securities shall be lodged with him as security for such advances.

The entire business of both firms shall be wound up and settled within twelve months from date, and if at that date there shall be any liabilities outstanding then each member shall contribute his proportion of money sufficient to cancel and pay any such indebtedness, and when said indebtedness shall have been so paid then any remaining assets shall be divided amongst the parties according to their respective interests.

(Signed) SAM'L J. HARRISON.
D. J. GARTH.
W. GODDIN.
J. L. APPERSON.
R. A. LANCASTER.

Plaintiff's counsel offers in evidence the original charter, dated March 22d, 1861, chapter 189 of the Public Acts of Virginia.

Defendants' counsel objects to the introduction of the document in evidence on the ground that it is irrelevant and immaterial.

Objection overruled and defendant excepts.

Then read in evidence as follows:

67 CHAP. 189.

An act to incorporate the Southern Express Company. Passed March 22, 1861.

1. Be it enacted by the General Assembly of the State of Virginia that S. W. Ficklin, W. W. Finney, J. A. Harman, James B. Ficklin, B. F. Ficklin and M. G. Harman and their associates, successors and assigns, be, and they are hereby, declared to be a body corporate and politic by the name of the Southern Express Company, for the purpose of an express transportation business.

2. The capital stock of said company shall be five hundred thousand dollars, and shall be divided into shares of one hundred dollars each; and in case the said capital stock be found insufficient for its purposes, such company may increase its capital stock from time to time to such amount as may be deemed necessary for the purpose aforesaid, not exceeding one million of dollars. Such increase must be sanctioned by a vote, in person or by proxy, of two-thirds in amount of all the stockholders of the company present or represented at a meeting of such stockholders.

3. The said company may commence business as soon as its capital stock is fully subscribed, and fifty thousand dollars of the same paid up; and on such subscriptions being made, any five subscribers to said stock may call a general meeting of the stockholders of the said company, by serving a notice signed by them of the time and place of such meeting, twenty days at least before the time of holding the same, on each stockholder personally, or by leaving it at his

residence, or by putting the same in the post office at Richmond, directed to him at his usual or reported place of residence, and paying the postage thereon; provided, however, that any other mode or time of calling said meeting shall be lawful, if all the stockholders consent thereto in writing, or are represented thereat. At the meeting convened as aforesaid, the said company shall elect, by a majority of votes there present or represented, not less than
68 five nor more than nine persons, being stockholders of the said company, to act as directors of the said corporation, who shall represent the said company, and manage the business thereof. Vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation.

4. At the first meeting of the said board of directors after their election, they shall elect one of their number as president of the said corporation, and may elect a vice-president and such other officers as they may deem advisable. The directors of this company shall hold their offices for one year, and until others are chosen.

5. In case it shall at any time happen that an election of directors be not made at the time designated, or on the days when by the by-laws of said company it ought to be done, it shall and may be lawful on any other day to hold an election for directors in such manner as above provided for, or as shall be directed by the by-laws of such company; and in case any annual meeting of stockholders shall not be held by reason of the neglect of the directors, it shall be in the power of any stockholders holding one hundred shares of the capital stock, to call such meeting for the purpose of electing directors and other purposes, by giving the notice as hereinafter prescribed; and for that purpose they shall have access to the stock list and transfer books of said company, and all information necessary to the giving of such notice.

6. And be it further enacted that the directors of such company shall have power to make and prescribe such by-laws and regulaas they shall deem proper, respecting the management and disposition of the property and estate of such company, the duties of the officers, agents, artificers and servants by them to be employed; to appoint such and so many officers, clerks and servants for carrying on the business of said company, and with such salaries or wages as to them shall seem reasonable, provided, however, that such by-laws be not consistent with any existing law.

7. The said company shall have power to do an express
69 transportation business by land or by water, for the conveyance of persons and property of every kind from, to and between any place in Virginia, and any place in or beyond the limits of Virginia, in their own conveyances or in those of other persons; and to create and organize branch agencies for the same purpose, and to build, hire, establish and maintain storehouses, warehouses and other buildings for the safe keeping of anything intrusted to them for conveyance; and shall have power to indemnify themselves by insurance against any loss or damage by fire or the risk of navigation and transportation on any goods, wares, merchandise or other property in their custody received by

them for transportation, or held by them as their property: provided that this act shall not be so construed as to give the said Southern Express Company any right or authority to build, purchase, occupy or establish any railroad or steamboat line, or other like means of transportation; nor shall the same be so construed as to suggest or require any railroad or steamboat line established in part or in whole within the limits of Virginia, to do or perform transportation service as herein contemplated for, or on account of the said Southern Express Company.

8. The principal office of said company shall be kept at Richmond, unless the same be changed by a vote of two-thirds of the directors, at a meeting called for that purpose, to any other place in the State; and the said company may establish as many branch or local offices as their business may require, or may be deemed necessary.

9. The regular meeting of the board of directors of said company shall be held at the principal office of said company, or at such other places in the State as the by-laws or the board of directors may designate; but the said company may hold special meetings of its directors for the transaction of business, at any place which the by-laws of said company may designate, or which a majority of the directors, with the approval of the president, may appoint.

10. If the said company shall have had unclaimed freight or baggage, not perishable, in its possession for the period of at least one year, it may proceed and sell the same at public auction, after giving notice to that effect in one or more newspapers published in Richmond, or at the place where such goods are to be sold, once a week for not less than four weeks, and shall also keep a notice of such sale posted for the same time in a conspicuous place in the principal office of the said company. In case such unclaimed freight or baggage shall, in its own nature or condition, be perishable, then the same may be sold as soon as it can be, on the best terms that can be obtained therefor. Said notice shall contain, as near as practicable, a description of such freight or baggage, the place and time when and where left, together with the name and residence of the owner of the freight or baggage, or person to whom it is consigned, if the same be known.

11. All moneys arising from the sale of freight or baggage as aforesaid, after deducting therefrom charges and expenses for transportation, storage, advertising, commissions for selling the property, and any amount previously paid for advances on such freight and baggage, shall be paid by the company to the persons entitled to receive the same. And the said company shall keep books of record of all such sales as aforesaid, containing copies of such notices, proofs of advertisements and posting, affidavit of sale, with the amount for which each parcel was sold, the total amount of charges against such parcel, and the amount held in trust for the owner, which books shall be open for inspection by claimants at the principal office of the said company, and at the office where the sale was made.

12. The stockholders in said company shall be personally respon-

sible for an amount equal to the amount of stock held by each for any loss of or damage on goods, moneys or other property intrusted to the said company for transportation, and for any contract made or liability incurred by them; provided, that nothing in this act contained shall be construed to diminish the common-law liability of said company as common carriers; and the said company
71 shall be subject to chapters fifty-six and fifty-seven of the Code, so far as the same may be applicable thereto, and not inconsistent with the provisions of this act.

13. That no right of property to this franchise shall vest until the minimum amount of capital is subscribed and fifty thousand dollars actually paid; of which fact it shall be the duty of the company to inform the governor in the same manner that the officers of a bank about to be put in operation are required to do; and when said company shall be organized and ready to go into operation, it shall be the duty of the presiding officer and treasurer to make a statement upon oath to the auditor of public accounts of the amount of capital paid in, and to make a like statement every six months thereafter with an additional statement of their profits and gross receipts; and for failing to make such report, they shall forfeit and pay into the public treasury one thousand dollars for each failure; to be recovered by motion, after ten days' notice, in the circuit court of the city of Richmond.

14. This act shall be in force from its passage, and shall be subject to modification or repeal at the pleasure of the General Assembly.

Plaintiff's counsel also offers in evidence preliminary proceedings held in Richmond in September and October, 1865, showing the organization of the company, and concluding proceedings held on the 16th of January, 1866, showing the acceptance of the amended charter. Put in evidence and marked "Exhibit C," as follows:

EXHIBIT C, C. B. C.

(This exhibit is a large printed pamphlet, and, by consent of all parties to the action now at bar, is not printed here *in extenso*. By stipulation of all parties this statement is here made (instead of printing the entire exhibit): that the exhibit shows that at meetings held in Richmond, Virginia, September 18, 1865, and
72 from time to time thereafter the proceedings were properly taken to organize the company under the act of March 22, 1861, being chapter 189 of the Public Acts of Virginia, which is hereabove in evidence, and that at the meeting of the board of directors held January 17, 1866, at Richmond, Virginia, the amended charter passed December 12, 1865 (being chapter 275 of the Laws of Virginia of that year), was duly and formally accepted, and a reorganization was had accordingly.)

Same objection, ruling, and exception.

Plaintiff's counsel offers in evidence certificate of charter.
Same objection, ruling, and exception.
Put in evidence and marked "Exhibit D," as follows:

PLAINTIFF'S EXHIBIT D, C. B. C.

I, William E. Cameron, governor of the Commonwealth of Virginia, certify that H. W. Flournoy, whose name is signed to the within certificate bearing date the 27th day of March, 1885, is and was at the time of signing secretary of the Commonwealth, duly elected and qualified; that he is authorized by the laws of this State to make and sign such certificate, and that to all his official acts full faith, credit, and authority are due and ought to be given.

In testimony whereof I have hereunto set my hand as governor and caused the great seal of the State to be affixed. Done [SEAL.] at the city of Richmond this 27th day of March, A. D. 1885, and in the 109th year of the Commonwealth.

By the governor:

WILLIAM E. CAMERON.

H. W. FLOURNOY,
Sec'y Com'th and Keeper of the Seals.

73 The governor this day received an official notification from C. W. Purcell, president (*pro tem.*) of the National Express and Transportation Company, stating that one-third of the capital stock of the company had been subscribed and that one hundred thousand dollars had been paid up. This information is given in obedience to the provisions of the 9th sec. of the act to amend and re-enact "An act to incorporate the Southern Express Company," passed Dec. 12, '65. Notification filed this day with the executive documents.

F. H. PIERPOINT.

COMMONWEALTH OF VIRGINIA:

I, H. W. Flournoy, secretary of the Commonwealth of Virginia, do hereby certify that the above is a true copy of an entry made in the Executive Journal December 16th, 1865.

Witness my hand and official seal this 27th day of March, 1865.

[SEAL.] H. W. FLOURNOY,
Secretary of the Commonwealth.

Plaintiff's counsel also offers in evidence the amended charter, passed December 12th, 1865, being chapter 275 of the Acts of 1865 and 1866, page 379, as follows:

An act to amend and re-enact "An act to incorporate the Southern Express Company," passed March 22d, 1861, and to incorporate the National Express and Transportation Company, passed December 12, 1885.

Be it enacted by the General Assembly of the State of Virginia, That the act passed March 22d, 1861, entitled "An act to incorporate

the Southern Express Company" be amended and re-enacted so as to read as follows:

1. Be it enacted by the General Assembly of Virginia, That
74 Joseph E. Johnston, Wm. L. Montague, Wm. J. Hawkins, M. G. Harman, Francis Skiddy, Chas. W. Purcell, L. W. Glazebrook, John Echols and Benjamin Hart, and their associates, successors and assigns, be, and they are hereby declared to be, a body corporate and politic by the name of the National Express and Transportation Company; for the purpose of an express and transportation business; and as such shall have perpetual succession and a common seal which it may alter or renew at pleasure; and may sue and be sued, implead and be impleaded; contract and be contracted with; purchase, hold and grant such estates, real and personal, as may be necessary for the carrying on of the legitimate business of said company; and make ordinances, by-laws and regulations for the government of all under its authority, and the proper conduct of its affairs.

2. The capital stock of said company shall be five millions of dollars, and shall be divided into shares of one hundred dollars each; but the said capital stock may from time to time by order of the board of directors be increased to a sum not exceeding ten millions of dollars.

3. The said company may commence business as soon as one-third of its capital stock is subscribed and one hundred thousand dollars of same is paid up; and on such subscription being made, any five of the stockholders may call a general meeting of the stockholders of said company, by advertising the time and place of such meeting at least twenty days before the time of holding the same, in three of the daily newspapers of Richmond; provided, however, that any other mode or time of calling such meeting shall be lawful if two-thirds of the stockholders are represented thereat.

At the meeting convened as aforesaid, the said company shall elect, by a majority of votes then present or represented, not less than five nor more than nine persons, being stockholders of said company, to act as directors, who shall represent the said company and manage the business thereof.

4. The board of directors shall, at their first meeting after
75 their election, elect one of their number as president of the said corporation; and may elect such other officers as they may deem advisable. The president and directors of this corporation shall hold their offices for one year and until their successors are chosen. Vacancies in the board of directors shall be filled in such manner as the by-laws of the corporation may prescribe.

5. The annual election of directors and other officers of this corporation shall be held in such place and in such manner as its by-laws may prescribe.

6. The said company shall have power to do an express and general transportation business, by land or by water, for the conveyance of persons and property of every kind throughout or beyond the limits of Virginia, in their own conveyances or in those of such other persons or corporations as they may contract with; and to

create and organize branch agencies for the same purpose; and to form any such arrangement, purchase or union with any other express or transportation company as may, in their opinion, be advantageous; and to build, hire, establish and maintain storehouses and other buildings for the safe keeping of the property entrusted to their care for transportation; and shall have power to indemnify themselves by insurance against any loss or damage by fire, or the risks of navigation or transportation, on any property held either in their own right or as bailees.

7. The said company shall have power to sell all freights or baggage, if the same remain unclaimed more than one year in its possession; but such sale shall be at public auction, and after notice for not less than four weeks in one or more newspapers published at or nearest the place of sale; and if such freights or baggage are of a perishable nature, it may be sold as soon as necessary. Said notice shall contain, as near as practicable, a description of such freight or baggage, the place and time of its deposit with the company, together with the name and residence of the owner or the consignee of the same, if known. The proceeds of such sale
76 shall be applied to the satisfaction of all charges upon the said unclaimed freights or baggage, arising from its storage, transportation and sale. The residue, if any there be, shall be held in trust for the owner; and it shall be the duty of said company to keep at its principal office a faithful record of all proceedings had under this power of sale; which record shall be open to the inspection of all claimants.

8. The principal office shall be kept at Richmond, Virginia, unless the same be changed to some other place by a vote of two-thirds of the directors, and the said company may establish as many local offices as the president or board of directors may deem necessary.

9. The right to the franchise granted by this act shall vest as soon as one-third of the capital stock is subscribed and one hundred thousand dollars of same shall be paid up. Of these facts it shall be the duty of the company to inform the governor as the officers of banks about to be put into operation are required to do.

10. This act shall be in force from its passage, and shall be subject to modification or repeal at the pleasure of the General Assembly.

Same objection, ruling, and exception.

Plaintiff's counsel also offers in evidence the deed of trust dated 20th of September, 1866, between the National Express and Transportation Company and John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell.

Same objection, ruling, and exception.

Put in evidence and marked "Exhibit E" as follows:

PLAINTIFF'S EXHIBIT E, C. B. C.

This deed made the 20th day of September, A. D. 1866, between "The National Express and Transportation Company," a body politic and corporate under the laws of the State of Virginia, of the

first part, and John Blair Hoge, John J. Kelly and C. Oliver
77 O'Donnell, of the second part, witnesseth: That, in consideration of the trusts hereinafter declared, and of one dollar paid to the said party of the first part by the said party of the second part, doth hereby grant, bargain, sell, convey, assign and set over unto the said parties of the second part, all the estate, property, rights, and credits of the said party of the second part, of every kind and wherever situated, in or out of the State of Virginia, including leases, horses, wagons, carts, harness, office furniture, safes, chests, fixtures, and other effects, and moneys payable to the company, whether on calls or assessments on stock of the company, or on notes, bills, accounts or otherwise; which property, moneys are enumerated and set forth in a schedule to be marked "A," and annexed hereto, as soon as can be conveniently done; but the omission of any property, money, or other thing from such schedules is not to prevent the same from being hereby granted or assigned. But this deed is made on the following trusts—that is to say:

First. That the said parties of the second part (hereinafter called the trustees) shall permit the said party of the first part to remain in the possession and use of all the property hereby granted or assigned, except debts, claims and moneys payable, until the first day of November, A. D. 1866, and thereafter until the trustees shall be requested by one or more of the creditors hereby secured, and whose debt or debts shall then be due, to take possession of such property, but the trustees shall take possession thereof at any time after the date of this deed, if requested so to do by the board of directors of said party of the first part.

Secondly. That the trustees shall proceed without unnecessary delay to collect all the debts, claims, and moneys payable, which are hereby granted or assigned.

Thirdly. That as soon as the trustees shall be authorized under the foregoing provisions, to take possession of the other property hereby granted or assigned, they shall take possession thereof, and
sell the same at public or private sale, in such manner as
78 they shall deem best, for ready money, or on reasonable credits with good security.

Fourthly. That the trustees shall have authority to employ, at the expense of this trust, such agents, clerks, counsel, attorneys and servants as they shall deem necessary for the proper execution of the trusts of this deed, and to incur such other reasonable expenses as they shall deem necessary for that purpose.

Fifthly. That, out of the moneys which shall arise or come to the possession of the trustees under or by virtue of this deed, they shall pay first the expenses of this trust, including the cost of preparing, stamping and recording this deed, and a commission of five (5) per cent. to the trustees, on the moneys received—and next, they shall pay all debts now due or which shall become due from the said party of the first part to its officers and employees for their services as such, on or before the first day of November next, or such previous time as the trustees are required to take possession of all the property hereby granted as aforesaid.

Sixthly. Out of the remainder of such moneys the trustees shall next pay, in rateable proportion, the two debts which it now owes one to the Baltimore & Ohio Railroad Company, and the other to the Bank of Commerce (of Baltimore), the same being the principal debts due by the said party of the first part, but the precise amounts of which cannot be exactly stated.

Seventhly. That, out of the remainder of such moneys, the trustees shall pay all debts of the said party of the first part for which any officer or director of the company is now liable as indorser or surety for the said party of the first part.

Eightly. That out of the remainder of such moneys the trustees shall pay in rateable proportion, the balance of all debts, for which the said party of the first part shall become liable to any railroad companies for the transportation of express matter after the date of this deed and on or before the first day of November next, after first applying to said debts the net proceeds accruing to the
79 said party of the first part from such transportation, such net proceeds being what may remain of the compensation received for such transportation, after paying the current expenses of the business; and, notwithstanding anything hereinbefore contained, the said party of the first part shall have a right to receive all tolls and compensations accruing for the transportation of express matter not yet delivered to consignees, or not yet transported, although under existing contracts.

Ninthly. That, out of the remainder of the moneys which shall arise and come to the possession of the trustees under this deed they shall pay (so far as such remainder shall be sufficient) all other debts and liabilities of the said party of the first part now existing, in ratable proportions, so far as such debts and liabilities shall be made known to the trustees within ten months after the date of this deed, or before they shall have distributed any money under this ninth clause.

Tenthly. That any moneys remaining in the hands of the trustees herein named, after satisfying the foregoing trusts, shall be paid to said party of the first part.

In testimony whereof, Joseph E. Johnston, president of the said National — and Transportation Company, by virtue of authority in him vested by an order and resolution of the board of
[SEAL.] directors of said company, hath affixed the common seal of said corporation to this deed, as the act and deed of said corporation; and as evidence thereof, he also subscribes his name hereto the day and year above written.

J. E. JOHNSTON, *President.*

80 CITY OF RICHMOND, }
State of Virginia. }

I, Roger J. Page, a notary public for the corporation aforesaid in the State of Virginia, do certify that Joseph E. Johnston, president of the National Express and Transportation Company, whose name is signed to the writing above, bearing date September 20, 1866, has acknowledged the same before me in my corporation aforesaid.

Given under my hand this 20th day of Sept., A. D. 1866.
ROGER J. PAGE, *N. P.*

CITY OF RICHMOND, *To wit:*

In the office of the court of hustings for the said city, the 21st day of September, 1866—
This deed was presented and with the certificate annexed admitted to record at forty-five minutes past six o'clock p. m.
Teste: RO. HOWARD, *Clk.*

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, Charles W. Goddin, clerk of the chancery court of the city of Richmond and as such the custodian of the deed and will books of the hustings court as provided by law, do hereby certify that the foregoing is a true transcript from the records of the said court.
In testimony whereof I have hereto set my hand and annexed the seal of the said court this 21st day of February, 1890.
[SEAL.] CHAS. W. GODDIN.

81 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, Edward H. Fitzhugh, only judge of the chancery court of the city of Richmond, do hereby certify that Charles W. Goddin, whose name is signed to the foregoing certificate, is and was at the time of the signing of the same, clerk of the said court, duly qualified; that his attestation is in due form of law; that his signature is genuine and all his official acts entitled to full faith and credit.
Given under my hand this 21st day of February, 1890.
EDW. H. FITZHUGH.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, Charles W. Goddin, clerk of the chancery court of the city of Richmond, do hereby certify that Edward H. Fitzhugh, whose name is signed to the foregoing certificate, is and was at the time of signing the same only judge of the said court, duly qualified.
Given under my hand this 21st day of February, 1890.
CHAS. W. GODDIN.

Plaintiff's counsel also offers in evidence abstract of statutes of Virginia in respect to corporations and joint stock companies, &c., &c.
Same objection, ruling, and exception.
Put in evidence and marked "Exhibit F" as follows:

EXHIBIT F, C. B. C.

Abstracts of Statutes of Virginia.

Touching joint stock companies and corporations and
82 suits against and service of process upon the same, and also touching the jurisdiction of the chancery court of the city of Richmond, &c., &c.

Chapter 57 of the Code of 1873, page 546, treats of joint stock companies generally and land companies. The following are the pertinent sections:

1. When, by an act incorporating a joint stock company, commissioners are appointed to receive subscriptions to the capital stock thereof, public notice for thirty days shall be given by them of the time and places at which books will be opened for subscriptions, and the subscriptions shall be in shares of one hundred dollars each (2 R. C. p. 211, c. 234, section 1; 1836–'7, p. 101, c. 118, section 2; d. 58, c. 82, section 1; p. 75, c. 84, section 3).

2. If the act be to incorporate a bank of circulation, there shall be paid by every subscriber on each share subscribed for by him as follows, to wit: At the time of subscribing, ten dollars; immediately after the election of the first board of directors, twenty-five dollars; in thirty days from such election, twenty-five dollars; and the remaining forty dollars in two equal payments of twenty dollars each, in three and six months after the said election (1836–'7, p. 58).

3. Upon every subscription (for shares in any joint stock company) not provided for by the preceding section, there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors. The sums which under this and the preceding section are payable at the time of subscribing, shall be paid to the commissioners. (1836–'7, p. 75, c. 84, section 4; p. 102, c. 118, section 3; 2 R. C., p. 212, section 1.)

(Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, refer to subscriptions to railroad and canal companies in land, &c., and to opening books, calling meetings of stockholders, scale of voting, &c., of all joint stock companies.)

14. There shall be for every company a president and directors,
who shall be a board to have all things done that are proper
83 to be done by the company, except so far as may be otherwise provided by any law of the State, or any by-law or regulation of the stockholders. The stockholders may, in general meeting, prescribe the number of directors by a by-law, to take effect at the next annual meeting; but unless a different number be prescribed, there shall be five directors besides the president. The directors, and, where it is not otherwise provided, the president also, shall be elected by the stockholders in general meeting, with this exception only, that where the governor, or board of public works, may, on behalf of the State, lawfully appoint a portion of

the directors, and makes such appointment, the residue shall be elected in general meeting by stockholders other than the State. The stockholders, in general meeting, or other appointing power, as the case may be, may remove any director and fill the vacancy caused by such removal; but unless so removed, the directors shall continue in office until the next annual meeting of the stockholders, and until their successors shall be appointed. Should the number of directors be at any time reduced below the number necessary to hold a meeting of the board, the stockholders, or other appointing power, may fill the vacancies. (2 R. C., p. 212, section 4, 5; 1836–'7, p. 61, 64, section 6; p. 76, section 6; p. 103, section 6; 1841–'2, p. 63, c. 105, section 13; 1846–'7, p. 101, c. 111, section 3, 4, 15; 19 Gratt, 604; 5 Gratt, 174, 215.)

15. There shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders. During the absence of the president, the directors may appoint a president *pro tempore*. The directors may also fill any vacancy which may occur in the office of president or director otherwise than by removal. (2 R. C., p 212, section 4; 1836–'7, p. 62, '3, '4, section 6; p. 76, section 5; 5 Gratt, 174.)

16. The board shall appoint a cashier or treasurer, and such other officers and agents as it may deem proper, and prescribe their compensation. They shall give bonds payable to the company,
84 with such conditions as the board may require, and with such sureties as it may approve, and hold their places during its pleasure. (2 R. C., p. 212, section 5; 1836–'7, p. 62–'3, section 6; p. 76, section 5; p. 103, section 7; 6 Rand, 204; 3 Gratt, 215.)

(Sections 17, 18, 19, refer to account books to be kept, to meetings of board and its proceedings, &c.)

20. Immediately after the election of president and directors, the books for receiving subscriptions shall be delivered to them. If the whole capital stock shall not have been subscribed they shall take measures for obtaining subscriptions of the residue. They shall not, to obtain such subscriptions, sell the stock at less than par, but may fix the price of such residue at a premium, which shall be for the benefit of all the stockholders ratably. (2 R. C., p. 103, section 5; 1836–'7, p. 58, section 1; p. 77, c. 84, section 7; p. 103, section 3.)

21. Shares of stock shall be deemed personal estate, and as such shall pass to the personal representative or assignee of a stockholder. A book shall be kept by the company in which the shares may be assigned. (1836–'7, p. 77, c. 84, section 10; p. 109, sections 21, 23; 17 Gratt., 366.)

22. Immediately after the election of president and directors the money paid upon shares at the time of subscribing shall be paid by the commissioners, who may have received the same, to such person or in such manner as the president and directors may require. In case of failure so to pay, the company may recover the same against such commissioners by warrant or by action, according to the amount, or by motion in lieu of an action. (2 R.C., p. 212, section 1; 1836–'7, p. 102, section 3.)

23. If the money which any stockholder has to pay upon his shares be not paid, as required by the president and directors, the same, with interest thereon, may be recovered by warrant, action or motion, as aforesaid; or such shares may, after notice in a newspaper for one month, of the time and place of sale, be sold at public auction for ready money and transferred to the purchaser.
85 (2 R. C., p. 213, section 6; 1836–'7, p. 58–'9, section 1; p. 77, section 8; p. 104, section 8; 1844–'5, p. 80, c 97; 1846–'7, p. 203, c. 215, section 11.)

24. Out of the proceeds of such sale there shall be paid the charges, and the money which ought to have been paid upon said shares, with interest thereon. Any surplus shall be paid to the delinquent or his representative (*id.*).

25. If there be no sale for want of bidders, or if the sale shall not produce enough to pay the charges, and the money which ought to be paid with interest, the company may recover against such stockholder whatever may remain unpaid, with interest thereon, by warrant, action or motion, as aforesaid (*id.*, and 1819–'20, p. 22, c. 25, section 1: 4 Rand., 578).

26. No stock shall be assigned on the books without the consent of the company, until all the money which has become payable thereon shall have been paid; and on any assignment the assignee and assignor shall each be liable for any instalments which may have accrued, or which may thereafter accrue, and may be proceeded against in the manner before provided (2 R. C., p. 213, section 6, 32; 1836–'7, p. 77, c. 84, section 9; p. 104, section 8; p. 109, section 21; see *post*, section 29).

27. A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof, as it regards the company. (1836–'7, p. 65, section 6; p. 77, section 10; p. 104, section 9; p. 109, section 21).

28. The president and directors shall issue to each person appearing on the books of the company as owner of any shares of stock, fully paid on, a certificate for such shares under the seal of the company, signed by the president, and countersigned by the secretary, treasurer, or cashier. (2 R. C., p. 223, section 32; 1836–'7, p. 75, section 11; p. 109, section 21; 1872–'3, c. 300, p. 273–'4).

29. If any person shall, for valuable consideration, sell, pledge, or otherwise dispose of any of his shares of stock to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books,
86 the title of the former (both at law and in equity), shall vest in the latter so far as may be necessary to effect the purpose of the sale, pledge or other disposition, not only as between the parties themselves, but also as against the creditors of and subsequent purchasers from the former, subject to the provision of the twenty-sixth section. (1838, p. 26, c. 12, section- 2, 6, 8; *ante*, c. 44, section 10, and *post*, c. 129, section 1.)

30. The person to whom any such certificate may be issued may return the same to the office of the company, and, in person, or by an attorney acting under a power from him, assign on the books

of the company either the whole number of shares, mentioned in such certificate, or a less number. This certificate so returned, shall be cancelled and filed in the company's office. And thereupon so many new certificates shall be issued, and to such person or persons, as may be proper in the case. (1838, p. 26, c. 12, section 2, 6, 8).

(The remaining sections refer to renewal of lost certificates, declaration of dividends, liability of board if capital be declared as dividends, and divisions of capital, and to manufacturing, mining and land companies.)

Chapter 56 of the Code of 1873 treats of corporations generally. The 31st section is as follows:

31. When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members, according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its work, property and debts, among those entitled thereto. (1836–'7, p. 46, c. 68, section 6; p. 78, c. 84, section 14; 7 Leigh. 154; 1 Rob. 499; 2 Rob. 56.)

Chapter 163 of the Code of 1873 treats of notices and mo-
87 tions. Sections 1 and 2 show the mode of serving a notice and the evidence of service, and are as follows:

1. A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife, or any person found there, who is a member of his family, and above the age of sixteen years; or, if neither he nor his wife, nor any such person be found there, by leaving such copy posted at the front door of said place of abode. Any sheriff or sergeant, thereto required, shall serve a notice within his bailiwick, and make return of the manner and time of service; for a failure so to do he shall forfeit twenty dollars. Such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner and time of service (1 R. C., p. 506, sections 66–'7; 4 Munf., 308; 16 Gratt., 317; 1 H. & M., 206).

2. Any such notice to a person not residing in Virginia may be served by the publication thereof once a week, for four successive weeks, in a newspaper printed in this State (1 R. C., p. 521, section 21; 1822–'3, p. 39, c. 37, section 3.)

Chapter 165 of the Code of 1873 prescribes, where actions at law or suits in equity may be brought—section 1 provides as follows:

1. Any action at law, or suit in equity, except where it is otherwise specially provided, may be brought in any county or corporation:

First. Wherein any of the defendants may reside.

Secondly. If a corporation be a defendant, wherein its principal

office is, or wherein its mayor or president or other chief officer resides. If the suit or action be to recover a loss under any policy of insurance, either upon property or upon life, the action or suit may be brought in the county or corporation wherein the property insured was situated, or the person whose life was insured, resided at the date of the policy of insurance (1863–'4, c. 12, p. 16 (Alexandria); 1872–'3, c. 215, p. 195; 21 Gratt., 153).

88 Chapter 166 of the Code of 1873 treats generally of process and the order of publication. Sections 2, 5, 6, 7, 11 and 12 are as follows:

2. Process from any court, whether original, mesne or final, may be directed to the sheriff of any county or sergeant of any corporation, except that process against a defendant (unless a railroad, canal, turnpike or telegraph company be defendant) to answer in any action brought under the sections of chapter one hundred and sixty-five shall not be directed to an officer of any other county or corporation than that wherein the action is brought. Any process may be executed on or before the return day thereof. If it appear to be duly served and good in other respects it shall be deemed valid although not directed to any officer, or if directed to an officer, though executed by any other to whom it might lawfully have been directed. It shall be returnable, within ninety days after its date, to the court on the first day of a term, or in the clerk's office, to the first Monday in a month, or to some rule day, except that a summons for a witness shall be returnable on whatever day his attendance is desired, and process awarded in court may be returnable as the court shall direct. (1 R. C., p. 102, section 32, 34; p. 194, section 17; p. 223, section 14; p. 498, section 39; p. 505, section 65; p. 507, section 70; p. 512, section 107; 1830–'31, p. 66, c. 11, section 71; 1846–'7, p. 66, c. 75, section 1; 1848–'9, p. 52, c. 98, section 2; 1852, p. 76, c. 89, section 1).

5. The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action. It shall be issued on the order of the plaintiff, his attorney or agent, and shall not, after it is issued, be altered, nor any blank therein be filled up, except by the clerk. (1 R. C., p. 472, c. 122, section 1, 3; p. 506, section 68; 1823–'6, p. 15, c. 15, section 1; 1836–'7, p. 44, c. 6, section 1, 3; 1842–'3, p. 51, c. 74, section 6; 2 Will. IV, c. 39.)

89 Any summons or *scire facias* against any person may be served as a notice is served under the first section of chapter one hundred and sixty-three; to which end the clerk issuing such process, unless otherwise directed, shall deliver or transmit therewith as many copies thereof as there are persons named therein, on whom it is to be served. No judgment by default, on a *scire facias* or summons, shall be valid, if it become final within one month after the service of such process. (1 R. C. p. 506, section 66–'8; p. 214, section 83; p. 255, section 42; 1823–'4, p. 27, c. 23; 1825–'6, p. 15, section 1; 2 Will. IV, c. 39, section 4; 3 and 4 Will. IV, c. 67; see *ante*, c. 163, section 1; 16 Gratt. 316).

7. It shall be sufficient to serve any process against or notice to a

corporation, on its mayor, rector, president, or other chief officer, or, in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which the process or notice is, if it be a city or town, on the president of the council or board of trustees, or in his absence, on the recorder or any alderman or trustee; and if it be not a city or town, on the cashier or treasurer; and if there be none such, or he be absent, on a member of the board of directors, trustees or visitors. If the case be against a bank of circulation, and be in a county or corporation wherein the bank has a branch, service on the president or cashier of such branch bank shall be sufficient; and if the case be against some other corporation, whether incorporated by the laws of this State or any other State or county transacting business in this State, on any agent thereof, or any person declared by the laws of this State to be an agent of such corporation; and if there be no such agent in the county or corporation, publication of a copy of the process or notice, as an order is published under the eleventh section of this chapter, shall together be sufficient. Service on any person under this section shall be in the county or corporation in which he resides; and the return shall show this, and state on whom and when the service was, otherwise the service shall not be valid (1 R. C., p. 473, c. 122, section 2; 1836–'7, p. 44, c. 68, section 90 2; 1838, p. 84, c. 108, section 7; 2 R. C., p. 117, c. 211, section 1–2; 1831–'2, p. 68, c. 75; 1848–'9, p. 52, c. 98, section 1; 19 Gratt., 393; 20 Gratt., 472; 6 Leigh, 399; 11 Leigh, 372, 12 Leigh, 84; 1872–'3, c. 244, p. 220; 16 Gratt., 318).

11. When, by the return of any officer of process issued to answer any appeal or supersedeas now pending or which may be hereafter pending in the supreme court of appeals in this Commonwealth, or when, from affidavits filed with either of the clerks of said court, it shall appear that the appellee or defendant in any such appeal or supersedeas is a non-resident of this Commonwealth, or that the name or place of residence of such parties are unknown, so that process cannot be served upon them, it shall and may be lawful for the clerks of such court in vacation, upon application, to take and issue, on the first Monday in any month, an order of publication against such absent or unknown parties, requiring them to appear on a certain day to be designated in said order, then and there to answer the said appeal or supersedeas, and to have a rehearing of the whole matter therein contained (1861, c. 15, p. 39).

12. A copy of such order of publication shall be inserted for four weeks in some newspaper to be named therein, and posted at the door of the court-house of such courts; and when it shall appear that said order of publication has been duly published and posted as aforesaid, the said court may proceed to hear and decide such causes in the same manner as if the said parties had been personally served with process; provided, however, that the order of publication shall have been executed as aforesaid, at least thirty days before the day on which any such case may be called for trial (19 Gratt., 109).

Jurisdiction of the Chancery Court of the City of Richmond.

The following act touching the jurisdiction of the chancery
91 court of the city of Richmond may be found in acts of eighteen hundred and seventy-four, pages 224, 225.

1. Be it enacted by the General Assembly, That section six of chapter one hundred and fifty-five of the Code of Virginia of eighteen hundred and seventy-three be re-enacted and amended so as to read as follows:

SECTION 6. The chancery court of the city of Richmond, shall exercise exclusively all jurisdiction now vested in circuit or corporation courts concerning the probate and recordation of wills, the appointment, qualification, and removal of fiduciaries, and the settlement of their accounts; the docketing of judgments, the recordation in the mode prescribed by law of deeds and other papers required by law to be recorded, and shall have exclusive jurisdiction of all suits and proceedings in chancery recognizable by law in any circuit court of the Commonwealth. And the said court and the judge thereof, respectively, shall have the same jurisdiction and powers, and perform the same duties which, by the provisions of chapter seventy-six, section forty-six of chapter eighty-two, section thirteen of chapter one hundred and twenty-three, chapter one hundred and twenty-five, sections eighteen, nineteen, and twenty-six of chapter one hundred and fifty-five, section six of chapter one hundred and sixty, sections seven and eight of chapter one hundred and fifty-seven, chapter one hundred and sixty-four, sections three and six of chapter one hundred and seventy-one, section two of chapter one hundred and seventy-three, section eight of chapter one hundred and seventy-four, and chapter one hundred and seventy-five of the code of eighteen hundred and seventy-three, are vested in and devolved upon the circuit courts of the State and the judges thereof, respectively. And the aforesaid statutes and all others now in force, or which may be hereafter enacted, devolving any duty or conferring any power or jurisdiction upon the circuit courts, or the judges thereof respectively, shall be construed as including the chancery court of the city
92 of Richmond and the judge thereof respectively, except as to matters of common law or criminal jurisdiction; and all acts heretofore done, and proceedings heretofore had by said chancery court or the judge thereof, under and by virtue of any statute, except as aforesaid, are hereby declared to be as lawful and valid as if such acts and proceedings had been done or performed by a circuit court or a circuit judge. And the said chancery court and the judge thereof respectively, shall have the same power as a circuit court or a circuit judge to admit to bail, award writs of *habeas corpus*, *quo warranto*, mandamus and prohibition. During the absence of the judge of said chancery court, or the inability of said judge from any cause to hold a term of his court, or to sit in any particular case, or discharge any duty required by law, the said term may be held, or said cause may be tried, or the said duty may be performed by any circuit judge, or by the judge of the hustings court of the city of

Richmond; provided, however, that no extra compensation shall be allowed therefor. The rules in the clerk's office of the chancery court shall be held in the same manner that the rules in a circuit court are, or may hereafter be held.

The following act as to the substitution of trustees may be found in Acts of 1874–'75, p. 423:

1. Be it enacted by the General Assembly, That the eighth section of chapter one hundred and seventy-four of the Code of Virginia (edition of eighteen hundred and seventy-three), be amended and re-enacted so as to read as follows:

SECTION 8. In a suit in equity, in which it appears that a trustee has died, although the heirs of such trustees be not parties to the suit, yet if his personal representatives and the other persons interested be parties, the court may appoint another trustee in the place of him who died, to act either alone or in conjunction with any surviving trustee, as the case may require; and in any case, when a trustee, and when there is more than one, all the trustees in any deed of trust shall have died, or removed beyond the limits
93 of the State, or shall decline to accept the trust, or where, having accepted, it is, in the opinion of the court, clearly for the benefit of the trust, to allow the trustee to resign, having first made a final settlement of his accounts, as such trustee, any person interested in the execution of the deed, may apply by motion to the circuit, county or corporation court of any county or corporation in which such deed is recorded, who may appoint a trustee or trustees in the place of the trustee or trustees named therein; and the trustee or trustees so appointed and accepting the same, shall be substituted to all the rights, powers, duties and responsibilities of the trustee named in the deed; provided, that the grantors and grantee in said deed, their heirs or personal representatives, the creditor, surety or other persons intended to be secured thereby, or their personal representatives, shall have ten days' notice of such motion—the mode of serving which shall be as prescribed in the first and second sections of chapter one hundred and sixty-three.

Shelton *vs.* Jones, 26 Grat., 895–902; Crickard *vs.* Crickard's Legatees, 25 Grat., 426; Gibson *vs.* Beckham, 16 Grat., 321.

* * * * * * *

Plaintiff's counsel also offers in evidence chapter 155 of the Code of Virginia of 1873 and section 13 of that code in regard to the jurisdiction of the circuit court of Henrico, commencing on page 1040 and including page 1044.

Same objection, ruling, and exception.

Section then read as follows:

CHAPTER CLV.

Of the Circuit Courts and of the Chancery Court of the City of Richmond.

Circuit courts established in each county and corporation; their jurisdiction.

94 1. For the city of Williamsburg and county of James City, and for every other county in addition to the county of Henrico, and for each of the cities of Norfolk, Petersburg and Lynchburg, there shall continue to be established a circuit court, which shall be called the circuit court of such county or city, or of such city and county, as the case may be.

2. The circuit court shall have the same jurisdiction as is provided by law on the day before this act takes effect, and shall, in addition, have exclusive original jurisdiction for the trial of indictments for felonies, and for cases of contested elections which may be cognizable by any court. Jurisdiction of writs of mandamus, prohibition and certiorari (except such as may be issued from the court of appeals) shall be in the circuit court of the county or corporation in which the record or proceeding is to which the writ relates. Any such writ may be awarded either by the circuit court or (in vacation) by the judge thereof.

* * * * * * *

Chancery court for the city of Richmond; its jurisdiction.

5. There shall be, for the city of Richmond a court of probate and record, to be called the chancery court of the city of Richmond, to be held by a judge with like qualifications, and elected in the same manner, and for the same term, as judges of the circuit courts.

6. The chancery court of the city of Richmond shall exercise, exclusively, all jurisdiction now vested in circuit or corporation courts concerning the probate and recordation of wills, the appointments, qualifications and removal of fiduciaries, and the settlement of their accounts; the docketing of judgments, the recordation in the manner prescribed by law, of deeds and other papers required by law to be recorded; and shall have exclusive jurisdiction of all suits and proceedings in chancery cognizable by law in any circuit court of the Commonwealth. And the said court and the judge thereof, respectively, shall have the same jurisdiction and
95 powers, and perform the same duties which, by the provisions of chapter one hundred and seventy-five, are vested in and devolved upon the circuit courts of the State, and the judges thereof respectively.

* * * * * * *

Circuit court of Henrico established; its jurisdiction, powers, and duties; transfer of suits from previous court.

13. A circuit court, to be called "the circuit court of the county of Henrico," shall be established for that part of said county which

is without the corporate limits of the city of Richmond; and the said circuit court, and the judge thereof respectively, in all causes and matters, civil and criminal, which may hereafter arise, or be brought or prosecuted, shall have and perform as to and for that part of said county, jurisdiction, powers and duties like the jurisdiction, powers and duties which other circuit courts and the judges thereof have or may perform in and for the counties, cities or towns for which the said circuit courts respectively may be held. All causes and matters which shall be depending and undetermined in the circuit court of law for the county of Henrico on the day before this act takes effect shall be proceeded in, tried and determined in the said circuit court of the county of Henrico, which, as to said causes and matters, shall succeed to and have the jurisdiction, powers and duties which, under the laws in force when the constitution was adopted, would have been had or should have been performed by the said circuit court of law.

* * * * * * *

Plaintiff's counsel also offers in evidence chapter 170 of the Code of Virginia of 1873, section 2, on page 1103.

Same objection, ruling, and exception.

Then read in evidence as follows:

96 CHAPTER CLXX.

Of the Removal of Causes Pending in One Court to Another.

Power of county, corporation, or circuit courts to remove causes.

1. On the motion of any party to a suit, motion or other proceeding in a county or corporation court, who desires to remove the same to the circuit court having jurisdiction over said county or corporation, or to any other county or circuit court, the court may, after twenty days' notice to the adverse party, order such removal; or whenever, in the opinion of the county court or judge thereof, it is improper for said judge to try the same, the said county court may order such removal; or, upon like motion, the said circuit court or the judge thereof in vacation, after twenty days' notice to the adverse party, may order such removal to the said circuit court.

2. On the motion of any party to a suit in a circuit court, the said court may order it to be removed to any other circuit court, or to the court of the county or corporation for which the former circuit court is held. The judge of said court, in vacation, may make such order, after reasonable notice to the adverse party. The order of removal may be made by the court or judge, without motion or notice, when the judge is so situated as to render it improper, in his judgment, for him to decide or preside at the trial of the cause.

When suit is removed; clerk's duty; proceedings in court to which it is removed; costs attending removal.

3. When any suit is ordered to be removed, under this chapter, the clerk of the court from which, shall transmit to the clerk of the court to which, it is removed, the original papers therein, with the copies of all rules and orders made, and a statement of the
97 costs incurred by each party therein; whereupon the case shall be proceeded in, heard and determined by the court to which it is removed, as if it had been brought and the previous proceedings had, in said court. The costs attending such removal shall be charged as may be thought just by the court from which, or if it make no order on the subject, by the court to which, the case is removed.

(Other provisions of the statutes of the State of Virginia were proved in evidence on the trial, but by consent are not printed in this case.)

Plaintiff's counsel offers to read in evidence certified copy of the proceedings in chancery in Richmond between Glenn's Administrator and the National Express and Transportation Company and others, which contains a continuation after removal of the case from the chancery court of the city of Richmond to the circuit court of the county of Henrico, certified on the 24th of November, 1888.

Defendants' counsel objects upon the ground that it is not a complete record of the whole proceedings. I have a complete record, and if the plaintiff chooses to substitute the certified copy I hold in my hand for the copy he purposes to offer I will withdraw my objection. If he will put them both in together I will withdraw my objection.

PLAINTIFF'S COUNSEL: I have no objection.

Copy offered by plaintiff then put in evidence and marked Exhibit G, and the copy presented by defendants' counsel put in evidence and marked "Exhibit H," as follows:

(These exhibits are two copies of the same printed volume of 278 pages, and portions of them are, in this printed case, here omitted by consent.)

98 EXHIBITS G AND H, C. B. C.

In the Chancery Court of the City of Richmond.

W. W. GLENN'S ADMINISTRATOR, &c.,
v.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others. } Virginia.

Pleas before the judge of the chancery court of the city of Richmond.

Be it remembered that heretofore, to wit, on the 28th day of November, 1871, came the plaintiff, W. W. Glenn, suing on his own behalf and of such other creditors of the National Express and

Transportation Company as may become parties to this suit and contribute to the expenses thereof, by counsel, and sued out of the clerk's office of the chancery court of the city of Richmond subpœnas in chancery against the defendants, William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, directed to the sheriffs of the city of Richmond and town of Staunton, and returnable to the 1st December rules, 1871; which subpœnas in chancery and returns of the sheriffs thereon are in the words and figures following, to wit:

Subpœnas.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon William H. Perot, president of said company; William Davies, D. J. Foley, M. G. Harman, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, Wm. H. Webb, Lorenzo Norvell, John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court, on the first Monday in December, 1871, to answer a bill in chancery exhibited against them in our said court by W. W. Glenn, suing on his own behalf and such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the State of Virginia, as may become parties to this suit and contribute to the expenses thereof; and have then there this writ.

99

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

Return.

Executed on Joseph R. Anderson November 25th, 1871, by delivering him a true copy of the within spa. in chan.; the others not found.

BENJ. T. AUGUST, *D. S.*,
For JOHN W. WRIGHT, *S. C. R.*

Executed in the city of Richmond, said Anderson being a resident of said city.

The Commonwealth of Virginia to the sheriff of the town of Staunton, Greeting:

We command you that you summon W. G. Harman to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court, on the first Monday in December, 1871, to answer a bill in chancery exhibited against him

and others in our said court by W. W. Glenn, suing in his own behalf and of such other creditors of the National Express and Transportation Company, a company chartered and incorporated under the laws of the State of Virginia, as may become
100 parties to this suit and contribute to the expenses thereof; and have then there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the court-house, the 28th day of November, 1871, and in the 96th year of our foundation.

BENJ. H. BERRY.

Return.

Executed December 4th, 1871, as to M. G. Harman by leaving at his residence, in the city of Staunton, with a white member of his family over sixteen years of age, a copy of this "ch'y spa.," explained its purport, and requested that the same be handed to said M. G. Harman on his return, he being from home at the time.

W. L. MAURY, *S. A. Co.*

And at another day, to wit, at rules held in the clerk's office of the chancery court of the city of Richmond, on the first Monday, being the 4th day, of December, 1871, came the plaintiff and filed his bill; which bill and exhibits therewith are in the words and figures following, to wit:

Bill.

W. W. GLENN
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMP'Y and Others.

To the Honorable Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

Humbly complaining showeth unto your honor your orator, William W. Glenn, of Baltimore city, who files this bill on behalf
101 of himself and such other creditors of the National Express and Transportation Company as may become parties to this suit and contribute to the expenses thereof; that your orator is a creditor of the National Express and Transportation Company to the amount of $42,501.31, with interest thereon from the 24th day of June, 1870, for which sum your orator recovered a judgment against said company in the superior court of Baltimore city, on the 24th day of June, 1870, as will appear by a short copy of said judgment herewith filed and made a part of this bill, marked Complainant's Exhibit W. W. G. No. 1, and a full transcript of which judgment your orator will produce when thereto required.

And your orator charges that said National Express and Transportation Company was duly incorporated by the legislature of the State of Virginia on the — day ——, 1865, as will appear from the act of incorporation found among the printed laws of said State,

to which reference is hereby made and a copy whereof will be produced when required.

And your orator further charges that said company accepted said act of incorporation and proceeded to conduct its business in pursuance thereof until the 20th day of September, 1866, when said company, having become much embarrassed in its affairs and owing large debts to various persons, executed a deed of trust for the benefit of its creditors to the defendants John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly, dated the 20th day of September, 1866, which was duly recorded in the city of Richmond, in the city of Baltimore, and elsewhere, and a copy of which is herein *with* filed and made a part of this bill, marked Complainant's Exhibit W. W. G. No. 2.

And your orator further charges that the assets of said company, to which its creditors have to look mainly for the payment of their debts, consist of the amounts contracted to be paid by the subscribers to its capital stock.

And your orator charges that the total number of shares of the stock of said company which had been subscribed for at the
102 date of said assignment was 40,044, each share being of the par value of $100, and said subscriptions representing the large aggregate of $4,004,400, and that on the 29th day of October, 1866, the condition of said company with reference to its stock and debts was reported at a meeting of stockholders as follows:

(The said bill continuing with further allegations, as shown by said exemplified record, which are here omitted by consent, and with further allegations, as follows:)

And your orator further charges that there has not been recently any election of officers by said company, but he is advised that under its charter and the laws of Virginia the officers of the said company last elected remain such officers until the election and qualification of their successors and are competent to exercise the power of such officers.

And he is further advised and submits that under the laws of Virginia the corporate franchises of said company and its existence as a corporation continue in full force and effect until the affairs of said company shall have been fully settled and its debts paid.

And your orator charges that William H. Perot, of Baltimore, is the president of said company, and that the board of directors thereof are William Devries and D. J. Foley, of Baltimore; M. G. Harmon, of Staunton, Virginia; Jos. R. Anderson, of Richmond; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C; Wm. H. Webb, of New York city, and Lorenzo Norvell, whose residence is unknown to your orator.

The principal office of said corporation is in the city of Richmond, in the State of Virginia.

Forasmuch, therefore, as your orator and the other creditors of said company are without remedy in the premises, save in a court

of equity, and to the end that an account may be taken of the debts due by said company, and that said trustees may state what amount, if any, of money or other property they have received for the
103 payment of the debts of said company and what payments they have made, and what debts and other property or money belonging to said company they now hold under said deed of trust, and that an account may be taken of such available assets of said company as may now be held by said trustees, and of the subscriptions yet unpaid and uncalled for, and of the value thereof, and that the amount necessary to be assessed upon the solvent subscribers of said company in order to provide means for the payment of its debts and of the expenses of collecting and administering the same may be ascertained, and that said board of directors of said company may be decreed to levy an assessment or to make a call upon the subscribers for payment of a sufficient amount of their unpaid and uncalled for subscriptions to pay the said notes and all necessary expenses in case said board of directors shall otherwise be unwilling or fail to take such account and to make such call voluntarily;

And that the validity, effect, and scope of said deed of trust may be ascertained and pronounced upon by this court, and the powers, duties, and rights of the trustees and of the creditors of said company thereunder may be ascertained and interpreted, and the execution of said trust, if the same be held valid, be decreed, and that in the meantime a receiver or receivers *ad litem* may be appointed by this court with power and authority to receive, sue for, and collect and reduce to money all debts, choses in action, and claims now in the hands of said trustees, and to take possession of and sell all property vendible in its nature held by said trustees, and with full power and authority to sue for, receive, and collect any moneys that may become due from any stockholders of said company upon any new or additional calls that may be made by said company upon said stockholders, and that said trustees and said company may be required to execute and deliver to said receiver or receivers or trustees *ad litem* any and all assignments, deeds, and conveyances as may be necessary to vest such receiver or receivers or trustees *ad litem* with legal power and authority to sue for, demand, and receive
104 such debts or other property of said company, or that in case the same be necessary that such receiver or receivers or trustees *ad litem* may be authorized to use the names of said trustees or of said company in prosecuting any suits or actions that may be necessary to compel payment of any debts due said trustees or said company, or to reduce its property to possession, and that such receiver or receivers or trustees *ad litem* may bring into this court to await its final order any and all moneys received or collected by him or them under said decree or order, and that your orator and the other creditors of said company may have such other or further relief as the equity of the case may require and to your honor may seem meet, may it please your honor to grant unto your orators the writ of subpœna to the said The National Express and Transportation Company and to the officers and directors thereof above named and to the said John Blair Hoge, C. Oliver O'Donnell, and

John J. Kelly to be directed, commanding them to be and appear in this court and answer fully in the premises, and show cause, if any they have, why a decree should not be passed as prayed and your orator have the relief he seeks.

And your orator, as in duty bound, will ever, &c.

MARSHALL & FISHER.
JOHN HOWARD, *p. q.*

105 COMPLAINANT'S EXHIBIT W. W. G. No. 1.

In the Superior Court of Baltimore City, May Term, 1870.

W. W. GLENN
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY.

29th April, 1869, *nar.*, 3 prom. notes, 3 protests, acc't and affi't f'd. Sum'd by service on Wm. H. Perot, president.

8th June, 1869, judgment by default for want of plea and affidavit.

24th June, 1870, judgment by default extended for $42,501.31, damages assessed by the court, with int. from 24th June, 1870, and costs.

Order of court f'd.

Plaintiff's costs, $8.65; defendant's costs, $5.30.

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that the aforegoing is a true short copy of the judgment in the above-entitled cause, taken from the record of the proceedings of the superior court of Baltimore city; and I hereby further certify that said record contains no proceedings or entry to show that the judgment aforesaid has been satisfied either in whole or in part.

In testimony whereof I hereto set my hand and affix the seal [L. S.] of the said court this 23d day of October, A. D. 1871.

GEORGE ROBINSON,
Clerk of the Superior Court of Baltimore City.

106 COMPLAINANT'S EXHIBIT W. W. G. No. 2.

(This exhibit is the deed of assignment to trustees Hoge, Kelly, and O'Donnell, made September 20, 1866, which is already in evidence in the case now at bar, marked Exhibit E, and is found at pages 76–81, foregoing.)

And the subpœnas having been returned executed on Jos. R. Anderson and M. G. Harman, it was ordered that unless they should appear at the then next rules and plead, answer, or demur to the plaintiff's bill the same would be taken for confessed as to them,

and the matters thereof decreed accordingly; and the cause was continued for directions as to the other defendants.

And at another day, to wit, at rules held in the clerk's office of the said court on the last Monday in December, 1879:

The defendants, Jos. R. Anderson and M. G. Harman, still failing to appear, plead, answer, or demur to the plaintiff's bill, the bill was taken for confessed, and on motion of the plaintiff's counsel the cause was set for hearing as to them and continued for directions as to the other defendants.

And at another day, to wit, on the fourth day of August, 1879:

Came the plaintiff, by counsel, and filed his amended and supplemented bill; which bill and the exhibits therewith are in the words and figures following, to wit:

107 *Amended and Supp-emental Bill.*

JOHN W. WRIGHT, Sheriff, &c., and Adm'r of W. W. Glenn, Who Sued, &c., *vs.* THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY. } In the Chancery Court of the City of Richmond. Richmond, Va.

By way of amendment and supplement to the original bill heretofore filed in this honorable court in the above-entitled cause by William W. Glenn, now deceased, in behalf of himself and other creditors of the National Express and Transportation Company against the said company and others, John W. Wright, sheriff of the city of Richmond aforesaid, and as such administrator in Virginia of the estate of the said William W. Glenn, dec'd (the said suit having been revived and ordered to proceed in the name of said Wright, sheriff and administrator as aforesaid), respectfully states and charges that the said judgment mentioned and set forth in said original bill as having been obtained by the said Glenn against the said company is still unsatisfied, and that neither the said company nor any of its officers or agents has made any effort to satisfy or done anything looking to the satisfaction of the same in whole or in part. On the contrary, alike the said company, its officers and agents and its trustees, the said John Blair Hoge, J. J. Kelly, and C. Oliver O'Donnell, have neglected, failed, and refused to take any step towards the satisfaction and payment of said debt. Meanwhile many of the stockholders of said company have become insolvent or bankrupt, and others have departed this life, leaving their estates in confusion, and all of the reasons which originally made it
108 proper for this court to grant the relief prayed for in said bill now exist with greatly increased strength and urgency. Indeed, instead of doing their duty in the premises the said company and its said trustees have rather set the creditors at defiance than made any effort to pay the corporate debts, and alike by their delay and non-action and by their obstruction of action on the part of the

creditors, including the said W. W. Glenn, have seriously imperilled the payment of said debts.

The books of the said company are in the possession of said trustee, John J. Kelly, who was the last superintendent of the company, and he both refuses to submit them to the inspection of the creditors of the company and to allow copies to be made for their use; but a copy has now been obtained of the list of stockholders, and if the original books cannot be obtained your complainant is advised that this copy may be used in the case. It will be produced and filed in this cause when needed or required.

The said John Blair Hoge and John J. Kelly, trustees in said deed of trust, are non-residents of this State. Said C. Oliver O'Donnell, who was the other trustee in said deed, is dead, and his estate has been committed to the sheriff of the said city of Richmond, who, by statute in such case made and provided, may, as his personal representative, execute, so far as said O'Donnell is concerned, the trusts of said deed, or this honorable court may appoint another trustee or trustees if necessary in the place of the said O'Donnell and of the said John Blair Hoge and John J. Kelly, who refuse or fail to act and who are out of the jurisdiction of the court, for your complainant is advised and insists that the trusts of said deed, whatever they may be, will not be permitted to fail because either of the absence, non-residence, recusancy, death, or other default or disability of said trustees or of any of them, and that, if necessary or proper for the protection and realization of the rights of the creditors of said corporation, all of the property and estate of every kind of the said corporation which has long ceased to exercise its franchises or to do business will,
109 as a trust fund for the payment of the corporate debts, be directed to be conveyed (by a commissioner appointed for that purpose) either to a new trustee *eo nomine* or to such receiver or receivers as the court may appoint, who shall be clothed with full powers to collect all the assets of the corporation and be required to bring the proceeds into court for the satisfaction of the corporate creditors.

And your complainant is further advised and insists that if upon due requirement thereto the said company should further fail to make such assessment upon its stockholders as may be necessary to pay its corporate debts, it will be within the rightful jurisdiction and province of this honorable court in furtherance of justice to order and require such assessment to be made under its direction by one of its master commissioners or otherwise, and the said assessment to be collected by due legal process and applied to the payment of said debts.

Your complainant is advised that such a course is within the legitimate jurisdiction and established practice of a court of equity and certainly the circumstances of this case call strongly for the vigorous exercise of all necessary powers of remedial relief.

Said corporation, national in name, but southern in its origin and affinities, set out on its career in the fall of 1865 with the most brilliant and ambitious prospects. By many, perhaps by most, indeed, who

subscribed for its stock, it was thought to be a great money-making scheme, and it did not hesitate to incur a large indebtedness in the establishment and carrying on of its business. This, in great part, it was enabled to do by the warm sympathy, good wishes, and hearty co-operation of many of the worthiest, most intelligent, and patriotic citizens and institutions of the land from whom it received encouragement and credit in a liberal manner; and such, in fact, was the reality and promising outlook of its large and prosperous business that, as appears by the said original bill, only a small part of the subscriptions to the capital stock was called for or paid in; but by the most unbusinesslike and culpable negligence and mis-
110 management the great and useful enterprise was suffered to fall through in November, 1866, and its numerous friends and creditors—many of them creditors because friends—were left in the lurch, and have been permitted to remain so ever since; nay, while the company has, as above stated, itself done nothing towards the payment of its debt, but the execution of the deed of trust aforesaid, the said trustees in said deed have wholly failed and refused to execute the provisions of said deed, though often requested thereto by the said W. W. Glenn and other creditors of the said company.

Among the claims against the said company it is believed that there are none more meritorious than that of the said Glenn, which is for money paid as endorser for said company and for money lent, &c. Your complainant herewith files a complete transcript of the record in the case of the said Glenn against the said company in the superior court of Baltimore city, in the State of Maryland, in which the said judgment mentioned in the said original bill was obtained, which transcript is marked "R" and is prayed to be taken as *as* part of this amended and supplemental bill. The said judgment, as will be seen by an inspection of said record, was founded upon three several negotiable notes made by the said company and endorsed and paid by the said Glenn after due protest of the same, and an account for money lent, &c., which said notes and account are duly set forth in said transcript, and proof of which said original causes of action will be furnished if required.

In consideration whereof your complainant prays that the said National Express and Transportation Company and the other persons mentioned as parties defendant in said original bill (with the exception of the said M. G. Harman, who is dead), namely, William H. Perot, of Baltimore, Maryland, president of said company; William Devries and D. J. Foley, of Baltimore, Maryland; Joseph R. Anderson, of Richmond, Virginia; F. P. Zimmerman, of Augusta, Georgia; J. Carter Mowbray, of Washington, D. C.; William
111 H. Webb, of New York, and Lorenzo Norvell, of Lynchburg, Virginia, who are directors of said company; M. B. Poitiaux, of Richmond, Virginia, cashier and treasurer of said company, and John Blair Hoge, of West Virginia, and John J. Kelly, of New York, surviving trustees in said deed of trust in the proceedings mentioned, and, if deemed necessary or proper, John W. Wright, sheriff of the city of Richmond, and as such administrator of said C. Oliver

O'Donnell, deceased, late one of the trustees in said deed, may be made parties defendant to this amended and supplemental bill, the said non-residents of the State of Virginia, by an order of publication duly made, and may be required to answer the same and said original bill; that the said claims of the said W. W. Glenn and other creditors of said company may be established and decreed to be paid; that all of the prayers in said originall bill contained may be granted as if the same were herein repeated; that the said trustees, John Blair Hoge and J. J. Kelly, may be required to deliver up and surrender to this court all of the books of said company of every kind and description that came into their hands or into the hands of either of them; that the said trustees be removed from office, and if necessary another trustee or other trustees may be substituted in their place and stead and the property and estate embraced in said deed of trust be conveyed to such substituted trustee or trustees or to such receiver or receivers as may be appointed by the court; that all proper process may issue; that all proper orders and decrees may be made, and that all such other, further, and general relief may be granted to your complainant and to the other creditors of the said National Express and Transportation Company as the nature of the case may require and to equity may seem meet; and he will ever pray, &c.

JOHN HOWARD, *p. q.*

(Here follows in said exemplified record the transcript marked Exhibit R in said amended and supplemental bill mentioned, but by consent it is here omitted.)

112 And thereupon subpœnas in chancery were issued against the defendants, directed to the sheriffs of the cities of Richmond and Lynchburg, returnable to 1st September rules, which subpœnas and the returns of the sheriffs thereon are in the words and figures following, to wit:

Subpœnas.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon the National Express and Transportation Company, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, and M. B. Poitiaux and John Blair Hoge and John J. Kelly, trustees, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer an original, amended, and supplemental bill in chancery exhibited against them in our said court by John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company.

And have then and there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the court-

house, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

Return.

Executed Aug. 8, 1879, by delivering to Joseph R. Anderson and M. B. Poitiaux each a copy of the within.

L. P. WINSTON, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

Executed in the city of Richmond, Aug. 8, 1879, as to the
113 National Express and Transportation Company, by delivering to Jos. R. Anderson, a director, and M. B. Poitiaux, cashier, of the said company, each a copy of the within spa. in chancery, each of whom is resident of said city of Richmond, the president not being a resident of the city of Richmond. The other defendants are not inhabitants.

L. P. WINSTON, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

The Commonwealth of Virginia to the sheriff of the city of Lynchburg, Greeting:

We command you that you summon Lorenzo Norvell to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer original and amended and supplemental bill in chancery exhibited against him and others in our said court by John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company; and have then and there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

Return.

Executed August 6th, 1879, on Lorenzo Norvell by delivering to him a true copy of the within summons.

M. J. DAY, *D. S.*,
For JNO. W. WRIGHT, *S. C. R.*

And affidavit having been made and filed that the defendants W. H. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge, and John J.
Kelly are non-residents of the State of Virginia, it is ordered
114 that they appear here within one month after due publication hereof and do what is necessary to protect their interests herein.

And at another day, to wit, at rules held in the clerk's office of the said court on the first Monday in September, 1879—

Came the defendant M. B. Poitiaux, by counsel, and filed his answer to the plaintiff's bill; to which answer the plaintiff replied generally, and the same is in the words and figures following, to wit:

Answer of M. B. Poitiaux.

To the Hon. E. H. Fitzhugh, judge of the chancery court of the city of Richmond:

The answer of M. B. Poitiaux, one of the defendants in a suit now before your honor; John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues, &c., &c., against The National Express and Transportation Company, W. H. Perot, M. B. Poitiaux, and other defendants.

For answer your respondent would say that he was the cashier of the first division of the said National Express and Transportation Company, his office being in the city of Richmond at the time of the conveyance executed by the said National Express Company to John J. Kelly, John Blair Hoge, and Columbus O. O'Donnell, trustees; that he had been cashier as aforesaid for some four or five months previously; that the said first division comprised the States of Virginia, North Carolina, part of South Carolina, and Bristol, Tennessee; that the said National Express and Transportation Company is in debt to your respondent as of the 31st day of January, 1867, in the sum of three hundred dollars for arrearages of his salary due and unpaid, and in the further sum of twenty-seven dollars and twenty-five cents for moneys advanced by him to pay sundry petty expenses in the office of the company, and which have never been refunded to him; that he has no books and papers in
115 his possession belonging to the said Express and Transportation Company; that he does not know anything about the transactions of the said trustees, nor in whose possession the books and papers now are or what has become of them; that he is not now nor ever was a stockholder in the said National Express and Transportation Company; and, having fully answered, prays to be hence dismissed, &c.

M. B. POITIAUX.

STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

This day personally appeared before me, J. L. Williams, a notary public in and for the city aforesaid, M. B. Poitiaux and made oath in due form of law that the statements made in the foregoing answer are true.

Given under my hand this 30th day of August, 1879.

J. L. WILLIAMS,
Notary Public.

And the subpœnas having been returned executed on Joseph R. Anderson, M. B. Poitiaux, The National Express and Transportation Company, and Lorenzo Norvell, and these defendants, except M. B. Poitiaux, failing to appear, it was ordered that unless they should appear at the then next rules and plead, answer, or demur to the plaintiff's bills the same would be taken for confessed as to them and the matters thereof decreed accordingly, and the cause was continued for proof of the publication and posting of the order heretofore made in this cause as to the non-resident defendants.

And at another day, to wit, at rules held in the clerk's office of the said court on the last Monday in September, 1879—

The defendants Joseph R. Anderson, The National Express and Transportation Company, and Lorenzo Norvell still failing to appear, plead, answer, or demur to the plaintiff's original and amended and supplemental bills, the same were taken for confessed, and, on motion of the plaintiff, by counsel, the cause was set for hearing as
116 to them and M. B. Poitiaux, and the cause was continued for proof of publication and posting of the order heretofore made as to the non-resident defendants.

And at another day, to wit, in the clerk's office of the said court, on the 6th day of October, 1879—

Proof of the publication and posting of the order made herein on the 4th day of August, 1879, and also of the subpœna in chancery issued herein on the 5th day of August, 1879, having been filed, on motion of the plaintiff's counsel, the cause was set for hearing as to all the defendants.

The Commonwealth of Virginia to the sheriff of the city of Richmond, Greeting:

We command you that you summon the National Express and Transportation Company, Wm. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, and M. B. Portiaux, John Blair Hoge, and John J. Kelly, trustees, to appear at the clerk's office of the court of chancery of the city of Richmond, at the rules to be held for the said court on the first Monday in September, 1879, to answer original, amended, and supplemental bill in chancery exhibited against them in our said court by John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased, who sues on behalf of himself and such other creditors of the National Express and Transportation Company.

And have then — there this writ.

Witness Benjamin H. Berry, clerk of our said court, at the courthouse, the 5th day of August, 1879, and in the 103d year of our foundation.

BENJ. H. BERRY.

A copy.

Teste: BENJ. H. BERRY, *Clerk.*

117 In the clerk's office of the chancery court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did, on the first day of September, 1879, that being the first day of the September term of the hustings court of said city, post a copy of the annexed order of publication at the front door of the new city hall, in which said hustings court holds its sessions.

J. T. POINDEXTER,
Dep. Clerk.

I hereby certify that the summons hereto attached of Berry, clerk of court, in suit of Wright *vs.* National Transportation Co. and others, was published in "The State" newspaper once a week for four weeks, the first insertion being on the 5th day of August, 1879.

JNO. HAMPDEN CHAMBERLAYNE, *Ed'r, &c.*
CHAMBERLAYNE & BEIRNE, *Ed's & Prop'rs.*

118 VIRGINIA:

In the Clerk's Office of the Chancery Court of the City of Richmond, August 5, 1879, in Vacation.

JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Company, Plaintiffs,

against

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, W. H. Perot, William Devries, D. J. Foley, Joseph R. Anderson, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, Lorenzo Norvell, M. B. Portiaux, John Blair Hoge, and John J. Kelly, Trustees, Defendants.

In chancery, on original, amended, and supplemental bill.

The object of this suit is to obtain a construction and enforcement of the deed of trust in the proceedings mentioned, from the National Express and Transportation Company to the defendants John Blair Hoge and John J. Kelly and another; to remove said Hoge and Kelly as trustees in said deed, and to subject all of the property, estate, and rights of every kind of said company to the payment of the debts of the plaintiff and other creditors of said company, and in furtherance thereof to appoint a receiver or receivers with due powers to collect and make available such property, estate,
119 and rights; and affidavit having been made and filed that the defendants Wm. H. Perot, William Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, William H. Webb, John Blair Hoge, and John J. Kelly are non-residents of the State of Virginia, it is ordered that they appear here within one month after due publication hereof and do what is necessary to protect their interests herein.

A copy.
Teste:
JOHN HOWARD, *p. q.*

BENJ. H. BERRY, *Clerk.*

I hereby certify that the notice hereto attached of Benj. H. Berry, clerk, John Howard, *p. q.*, in suit of Wright, adm'r, *vs.* The National Express and Transportation Co. and others was published in "The State" newspaper once a week for four weeks, the first insertion being on the 6th day of August, 1879.

RICHARD F. BEIRNE,
Editor, &c., for Chamberlayne & Beirne,
Owners and Editors of "The State."

In the clerk's office of the chancery court of the city of Richmond, the 29th day of September, 1879, John A. Meanley this day made oath before me that he did on the 1st day of September, 1879, that being the first day of the September term of the hustings court of said city, post a copy of the annexed order of publication at the front door of the new city hall, in which said hustings court holds its session.

J. T. POINDEXTER, *Dep. Clerk.*

120 And at the same day, to wit, at a chancery court of the city of Richmond continued by adjournment and held for said city on the 6th day of October, 1879.

JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Co., Plaintiff,

against

THE NATIONAL EXPRESS AND TRANSPORTATION CO., W. H. PEROT, Wm. Devries, D. J. Foley, Jos. R. Anderson, F. P. Zimmerman, J. Carter Mowbray, W. H. Webb, Lorenzo Norvell, M. B. Poitiaux, John Blair Hoge, and John J. Kelly, Trustees, Defendants.

This day this cause came on to be heard upon the original and amended bills taken for confessed as to all of the defendants except M. B. Poitiaux and Joseph R. Anderson, upon the several answers of the said Poitiaux and Anderson, (that of the said Anderson being this day filed by leave of court), with replications thereto, and exhibits filed, and was argued by counsel.

On consideration whereof it is adjudged, ordered, and decreed that one of the commissioners of this court do inquire and report—

121 1. An account of the debts due by the said defendant, The National Express and Transportation Company, and the priorities thereof, if any.

2. An account of the assets of said defendant company.

And such commissioner is directed to report specially any matters deemed pertinent by him or which he may be required to state by any of the parties.

Any party to the cause may be examined before such commissioner, and all or any books, papers, and documents of the said de-

fendant company in the possession of any party may be called for and required to be produced.

And it is further ordered that notice of the time and place of taking the said accounts be published once a week for four successive weeks in The State newspaper, published in the city of Richmond, and that such publication shall be equivalent to personal service of such notice on the parties to this cause.

The answer of Joseph R. Anderson referred to in the foregoing decree is in the words and figures following, to wit:

Answer of Jos. R. Anderson.

The separate answer of Joseph R. Anderson, oneof the defendants, to an original, amended, and supplemental bill of complaint exhibited against him and others in the chancery court of the city of Richmond by John W. Wright, sheriff of the said city, and as such administrator in Virginia of W. W. Glenn, dec'd, complainant.

To the Hon. Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

This respondent, reserving to himself the benefit of all just exceptions to the said original, amended, and supplemental bill, for answer thereto or to so much thereof as he is advised that it is material he should answer, answers and says that he does not
122 admit that he is a director in the National Express and Transportation Company, but that, to the best of his knowledge and belief, he resigned the directorship of the company very soon after his election thereto; that, moreover, he does not remember ever having acted in the capacity of a director of the said company at a single one of its meetings, and he prays to be hence dismissed with his reasonable costs by him in this behalf expended; and he will ever pray, &c.

JOSEPH R. ANDERSON, *Defendant.*
JAMES ALFRED JONES,
J. F. T. ANDERSON, *p. d.*

(Other proceedings are by said exemplified record shown to have been from time to time taken, including petitions filed by other creditors of the National Express and Transportation Company praying to be made parties coplaintiff in the suit upon the terms of sharing the costs and the benefits of the same, which petitions were granted, but all said proceedings are here omitted by consent.)

123 And at another day, to wit, on the 19th day of June, 1880, a report of Commissioner Otho G. Kean was filed in the cause, and the same and the depositions and exhibits filed therewith are in the words and figures following, to wit:

Report of Com'r Kean.

COMM'R'S OFFICE, 1113 MAIN STREET,
RICHMOND, *June* 19, 1880.

GLENN'S ADM'R
v.
THE NATIONAL EXPRESS & TRANSPORTATION COMPANY.
} In Richmond Chancery Court.

To the Hon. Ed. H. Fitzhugh, judge of said court:

By decree of this court entered in the above-styled cause October 6, 1879, it was adjudged, ordered, and decreed that one of the commissioners of this court do inquire and report—

(In said exemplified record here follows the report in full, reciting the provisions of the decree under which the commissioner was appointed, the notice given by publication, as required, of the time and place fixed for execution of the decree, the fact that he had taken depositions and other proofs, and a detailed statement of the names of all creditors and of the amounts of indebtedness to them severally, the amount unpaid on stock issued by the company, &c., &c.; but, by consent, the same is here omitted, except Kelly's deposition, here next below, and except the following statement, with which the report ends:)

124 The aggregate of debts, as shown by acc't No. 1, is $509,392.41, which will require an assessment of about 20 per cent. on $3,203,520, the value of unpaid stock, as above reported, after making an extremely moderate allowance for insolvent stockholders. Indeed I feel very sure that the sequel will show it to be insufficient.

O. G. KEAN, *Comm'r.*

(In said exemplified record are set forth the depositions and other proofs and proceedings before said commissioner, which are, by consent, here omitted, except the deposition of John J. Kelly, which here follows:)

COMMISSIONER'S OFFICE, *April* 26, 1880.

Depositions were continued, pursuant to adjournment, as follows:
Present: John Howard, Esq., *p. q.*

JOHN J. KELLY, a witness of lawful age, deposeth and saith as follows, having been first duly sworn:

By Mr. HOWARD, *p. q.:*

1st question. What is your residence and occupation?
Answer. I am a manufacturer of straw goods and reside in New York city.
2nd by same. Where did you reside in 1866?

Answer. Part of the time in Richmond, part of the time in Baltimore.

3rd by same. State what connection you had, if any, with the defendant, The National Express and Transportation Company, during that time, and what opportunities you had of knowing its business and the officers and agents who conducted it?

Answer. I was first general auditor of the company, subsequently a director and vice-president, and for the remainder of my term with them general superintendent. In all of these capacities I was familiar with the affairs of the company and with its officers and agents, books and accounts.

125 4th by same. Where have you subsequently resided?

Answer. In the city of New York.

5th by same. State about what time the company failed and ceased its operations.

Answer. I think the active operations of the company were closed up in November or December of 1866. Its various offices were closed as rapidly after that as possible.

6th by same. What connection, if any, did you have with the assets of the company after its failure and in what capacity, and what action did you take in the matter, if any?

Answer. I was one of three trustees to whom the company, by a deed of trust dated September 20th, 1866 (and mentioned in the papers of the case), assigned its affairs. The deed was not delivered to us, according to its provisions, until some time later, when we took charge of the affairs of the company. My cotrustees were John Blair Hoge and C. Oliver O'Donnell, then both of Baltimore. Mr. O'Donnell has since died, but he never took any active part in the matter. Mr. Hoge is now in West Virginia. I was the most active in the matter, but consulted Mr. Hoge. We met from the start with difficulties in the way of attachment suits and otherwise, and even before the deed of trust became operative by recording it at the various points necessary the larger part of the personalty of the company, in fact all its personalty, was seized in such suits and never came into our possession. We made efforts everywhere to realize the personal property of the company, but without the slightest sort of success. We were met with serious law proceedings in Maryland, where the affairs of the company were taken out of our hands and put in those of a receiver, and by a suit in New York by which we were enjoined from doing anything further in the matter. The trustees have been without funds either to prosecute or defend these litigations and the trust has consequently been permitted to lie without action. It should be added, however, that the trustees did defend the proceedings in Maryland and the receiver there

126 was removed and the affairs of the company returned to our hands.

7th by same. What part, if any, of the assessments made by the company upon the stockholders before it failed were collected by you and your cotrustees, and what effort did you make to collect them?

Answer. I have no recollection of any collection on account of

assessments on stock. All our efforts were delayed, as previously stated, and finally stopped by the injunction proceeding in New York.

8th by same. State whether or not the company received any notes from stockholders on account of said assessments; and, if so, what became of them?

Answer. I think there were notes and obligations from Ficklin used as collateral to raise money on at some time during the existence of the company. The company sometimes drew on various stockholders for amount of their assessments and deposited the drafts with its endorsement as collateral for loans or sent them through the bank for collection. In every case the company was the debtor, so far as the bank was concerned. This was particularly the case towards the close of the operations of the company when drafts for a large part of their last assessment were made upon the stockholders, and those drafts used to obtain money from the Bank of Commerce, with which the drafts were deposited.

9th by same. State, if you know, whether or not a great many of the stockholders of the company have become insolvent.

Answer. I only know one or two instances, in my own knowledge, in New York city. I am informed that very many of them have become insolvent.

10th by same. What percentage of assessment had been made when the company ceased business?

Answer. In all twenty per cent.

11th by same. What became of the books and papers of the company on its failure, and in whose custody and where have they been since?

Answer. The books and papers came into the possession of
127 the trustees in Baltimore, were taken from them by the order of a local court in Maryland and placed in the hands of Thomas G. Pratt as receiver, and subsequently, after his receivership had been vacated, they came into my possession, and I have had them in the city of New York ever since.

12th by same. Have you any of those books here present? And, if so, state what they are and so describe them as that they can be identified, and state also, if you know, in whose handwriting they severally are.

Answer. I have some of the books here, having brought them from New York at the call of counsel for the plaintiff, and will leave them in the commissioner's possession that he may examine them thoroughly and make such extracts as may be necessary, with the understanding, however, that when they have been so examined and extracts made they are to be returned to me in New York. I do not feel authorized to surrender them absolutely.

They are as follows:

1. "Stock Ledger A, N. E. & T. Co." It contains an account with each individual holder of stock, showing date of certificate, from and to whom transferred, number of the transfer, number of the certificate, number of shares and requisitions (or assessments) drawn. It is in the handwriting of the treasurer of the company,

Mr. J. V. H. Allen. I know his handwriting personally and know that he was treasurer.

1. "Subscriptions National Express Co.," containing a list of the stockholders of the company, classified under the names of the places in which the subscriptions were made or the stock held, showing the name of each stockholder at said place, the number of shares held, the amount paid, the amount due, and the votes to which he was entitled.

It is partly in the handwriting of the treasurer, Mr. Allen, and partly in that of the transfer clerk, his assistant. His name was Rob't Mayo, I think. I know his handwriting.

3. "Record N. E. & T. Co., board of directors," containing a record of the meetings and proceedings of the stockholders and directors.

128 It is in the handwriting of the various secretaries of the company or secretaries *pro tem.*, J. V. H. Allen, P. T. Moore, and others.

On pages 153, '4 is a memorandum in my own handwriting which shows on its face that it is not a minute of any official proceedings, but only an abstract of proceedings showing succession of officers, &c.

The page 152 closes the record of the last meeting of the directors of the company. I know both signatures to be genuine: "J. V. H. Allen, secretary; M. G. Harman, vice-president."

4. "Trial balance-sheet," containing the trial balances of the general ledger from time to time; semi-monthly to monthly trial balances, the last *been* dated October 8th, 1866. It shows the condition of the company, so far as written into its books up to that date. It is in the handwriting of the accountant of the company, A. B. Johnston.

13th by same. State whether or not you have any books, papers, or other memoranda which will enable you or any one to show what was the actual indebtedness of the company at the time it ceased operations and to whom severally this indebtedness was due.

Answer. I have no such books, papers, or memoranda. Nothing in the possession of the trustees or company would make a complete statement. Many claims were never presented to the trustees or to the company in any shape which has been preserved.

The company continued to contract debts with the railroad, its employees, and others after October, when the books stopped and the last balance was shown.

I may have in New York books which will give more information about the indebtedness of the company than the trial balance of the general ledger. If so, I will send them on to the commissioner, to be returned to me with the other books, as above stated. I know that I have the journal corresponding with the ledger, from which the trial balances were taken. I will describe such books as are sent, in a letter addressed to the commissioner, which I ask him to accept and file as part of this deposition.

129 14th by same. Have you any claim of your own against the company for services or otherwise? If so, please state it.

Answer. I have a claim against the company for services as general superintendent and disbursements for traveling expenses, &c., in the service of the company, amounting, March 1st, 1867, to $2,383.47, none of which has been paid. I will enclose an account of it, verified by affidavit (showing how much of it appears on the books of the company and how much accrued after the books were closed), to Commissioner Kean as part of my deposition.

15th by same. Do you know anything of a claim of H. Warfield against the company?

Answer. I know he has a considerable claim against the company arising out of a compromise between them. The company gave him notes, the consideration of which was a surrender of stock on his part. I see in the hands of the counsel for Warfield four notes dated August 10, 1866, due at three, six, nine, and twelve months, for $750 each, signed with the genuine signature of Jos. E. Johnston, president. I see also a certified copy of the minutes authorizing this settlement, with the genuine attestation of J. V. H. Allen, secretary.

The above papers are here filed with this deposition.

And further this deponent saith not.

JOHN J. KELLY.

Adjourned to meet again May 7th, 1880.

O. G. KEAN, *Com'r.*

130 And at another day, to wit, at a chancery court of the city of Richmond, continued by adjournment and held for said city on the 14th day of December, 1880:

JOHN W. WRIGHT, Sheriff of the City of Richmond, and as Such Administrator of W. W. Glenn, Deceased, Who Sues, &c., Plaintiff,

against

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others, Defendants.

In chancery.

This cause, in which proceedings have been had in the mode prescribed by the statute against the absent defendants, Wm. H. Perot, Wm. Devries, D. J. Foley, F. P. Zimmerman, J. Carter Mowbray, and Wm. H. Webb, and which has been regularly matured and proceeded in as to all of the defendants, came on this day to be heard upon the cause set for hearing as to the said absent defendants (M. G. Harman, one of the board of directors of said company, being dead, the suit is abated as to him), and upon the papers formerly read, the answer of the defendant John Blair Hoge, and the original answer of John J. Kelly, both of which were tendered to be filed at the last term and are this day filed *nunc pro tunc*, and the amended and supplemental answer of the said defendant John J. Kelly

this day filed, the general replications of the plaintiffs to the said several answers, and upon the report of Master Commissioner O. G. Kean of the 19th day of June, 1880, and the amended and supplemental report of said commissioner this day; filed to which
131 said several reports there is no exception, and upon exhibits filed, and was argued by counsel. On consideration whereof and for reasons expressed in writing, filed, and hereby made a part of the record and to be so considered, but not to be entered upon the order book, the court is of opinion (1st) that the deed of trust in the proceedings mentioned, bearing date the 20th day of September, 1866, made by the said National Express and Transportation Company to John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, trustees, for the benefit of sundry creditors therein referred to, is a good and valid deed under the laws of the State of Virginia, where the said corporation was chartered and had its principal office and where the said deed was executed, delivered, and recorded, and the court doth so adjudge, order, and decree; and the court is further of opinion (2ndly) that under the laws of the State of Virginia the legal effect of the said deed was to grant, convey, and assign to the said trustees all of the estate, property, rights, and credits of the said company of every kind and wherever situated or being, and that accordingly all of the said estate, property, rights, and credits did pass to and were vested in the said trustees by said deed, including the credits allowed by statute and by the said company to its stockholders for the uncalled-for and unpaid part of their several subscriptions to the capital stock of the said company and the right to receive and collect the same according to the terms of said contract of subscriptions for the purposes of said trust, and the court doth so adjudge, order, and decree.

(3.) And the court, being of opinion that the preferences provided for by said deed in favor of certain creditors therein referred to are legal and valid according to the laws of Virginia, doth so adjudge, order, and decree.

(4.) And it appearing to the court that said John Blair Hoge and John J. Kelly, surviving trustees in said deed, are willing each to resign and renounce the office of trustee under said deed, and
132 that they are so situated as not to be able efficiently to perform the duties of the same, and that it is right and expedient under all the circumstances that they be relieved from the said trusteeship, the court doth adjudge, order, and decree that the said John Blair Hodge and John J. Kelly, surviving trustees of themselves and C. Oliver O'Donnell under the said deed, bearing date the 20th day of September, 1866, executed to them by the said National Express and Transportation Company, in trust for the benefit of its creditors, be, and they are hereby, respectively removed from the office of trustee under said deed.

(5.) And it further appearing to the court that John Glenn, Esquire, of number twelve St. Paul street, in the city of Baltimore and State of Maryland, is a fit and proper person to execute the duties of said trust, it is adjudged, ordered, and decreed that the said John Glenn be, and he is hereby, substituted and appointed trustee in the

said deed in the room and stead of the said Hoge and Kelly, hereby relieved and removed, and that he be, and is hereby, clothed with all the rights and powers and charged with all the duties of executing the trusts of said deed to the same effect as were the original trustees therein; and the said John Blair Hoge and John J. Kelly are authorized and directed to transfer and deliver to the said John Glenn, substituted trustee as aforesaid, all of the books and papers of the said National Express and Transportation Company of every kind and description and all of the estate and property of said company of every kind and description now in possession of them, the said Hoge and Kelly, or either of them, and the receipt of the said John Glenn to them for the same shall be full acquittance and discharge therefor.

But the said John Glenn is not to take possession of said property, books, and papers or receive any money as such substituted trustee until he or some one for him shall enter into bond, with good security, before the clerk of this court in the penalty of one hundred thousand dollars, conditioned for the faithful discharge of his duties as such trustee.

133 (6.) And the court doth approve and confirm so much of said report of Commissioner O. G. Kean, filed on the 19th day of June, 1880, as ascertains the debts of said company, and doth adjudge, order, and decree that the said National Express and Transportation Company do pay to:

(In said exemplified record here follow itemized statements of the names of the creditors and of the amounts payable by the company to them severally, but the same are here omitted by consent.)

And it appearing to the court that the calls for subscriptions heretofore made by the said company, amounting to twenty per cent., have been exhausted or are now unavailing, and that the said company has now no property or assets out of which said debts or any part of them can be made, except the uncalled-for and unpaid subscriptions to the capital stock, amounting to eighty per cent., the right to receive and collect which, according to the contracts of subscription as well as the former calls, was conveyed and assigned in trusts as aforesaid and constitute a trust fund in the hands of the subscribers which is primarily liable for the debts of the company; and it further appearing to the court that by the second and fourth clauses of said deed of trust the trustees therein named were clothed with ample authority and power to collect, by suit or otherwise, all of the debts, claims, and moneys payable to said company which were assigned by said deed; and it further appearing to the court that on account of death, removal, insolvency, and other causes much of said uncalled-for and unpaid subscriptions has been lost, and great difficulty has been encountered in realizing what remains good from stockholders scattered in and among so many different and distant localities and States, and that it is necessary and proper that at least thirty per cent. of said subscriptions be now called for and required in order to meet the debts of said

134 company and the costs and expenses of collecting and ad-

ministering said fund; and it further appearing to the court that the said company has long since ceased and abandoned its business, and that for about fourteen years there has been no meeting either of the stockholders or of its board of directors, it is adjudged, ordered, and decreed that a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the said National Express and Transportation Company of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, and that the stockholders of said company and each and every of them and their legal representatives and assigns be, and they are hereby, severally required to pay the several amounts hereby called for and assessed to the said John Glenn, of the city of Baltimore, in the State of Maryland, substituted trustee in said deed of trust from the said company of the 20th day of September, 1866; and the said trustee is hereby authorized and directed to collect and receive the said call and assessment and to take such prompt steps to that end by suit or otherwise and in such jurisdictions as he may be advised, and if the amount realized from this call and assessment shall prove to be insufficient for the purposes of this decree, liberty is reserved to the said creditors and the said trustee to move the court for such further assessment as may be necessary and proper.

(The remainder of said decree and the answers of said John J. Kelly and John Blair Hoge, the surviving trustees, and their resignations severally are shown by said exemplified record, but are here omitted by consent.)

135 The amended and supplemental report of Com'r Otho G. Kean, referred to in foregoing decree and dated December 8th, 1880, and the exhibits therewith are in the words and figures following, to wit:

Amend'd and Supple. Report.

Comm'r's office, No. 1113 Ma-n street.

RICHMOND, *Dec'r 8th*, 1880.

GLENN'S ADM'R
v.
NATIONAL EXPRESS & TRANSPORTATION CO.

To the Hon. Ed. H. Fitzhugh, judge of the chancery court for the city of Richmond:

By request of John Howard, Esq., of counsel for W. W. Glenn's adm'r, and, as I am informed, with the approval of the court I now submit the following as a supplement to my report filed in this cause June 19th, 1880:

I. Herewith returned are four papers, marked respectively "A," B," "C," and "D." They are extracts taken from the record book of the board of directors of the defendant company. I have care-

fully compared them with the originals in said book and find and hereby certify them to be true copies.

II. In my former report, filed June 19th, 1880, a statement was rendered showing an assessment of 20 per cent. on the par value of unpaid stock—being 80 per cent. of the par value of the original stock—was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I
136 think, in two particulars: First. The assessment, whatever it be, should be laid on the par of the stock and not on that amount less assessments heretofore made. In other words, the par or face value of the company's stock should furnish the basis of the assessment. Secondly. On reflection I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary power of the court. The reasons seem sufficiently obvious. The stockholders by whom the enormous debt of the defendant company is due are very numerous; as shown by evidence in the cause, they are widely dispersed; many are, doubtless, insolvent, many dead, and consequently the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessments should provide for these costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact amount of the defendant's liabilities would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interests of debtor as well as creditor that an assessment should be laid at the start on which enough may be realized to satisfy the debts of the company, and this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment, it will be more easy as well as less expensive to return the overplus to the stockholders than it would be (in the event of deficiency) to collect a second one.

The following statement is based on the foregoing views:

Par value of 40,044 shares, at one hundred dollars per share	$4,004,400
On which an assessment of 30 per cent. would give (for payment of the company's debts and the costs and expenses of collection)	1,201,320

137 This sum greatly exceeds, it is true, the amount of debt, which, with probable costs, is about $650,000, but I fix the assessment at 30 per cent. because I think it safe to assume that not more than 30 per cent. of any assessment will be realized.

Respectfully submitted,

OTHO G. KEAN, *Comm'r.*

Fee, $10.

(Here follow, in the said exemplified record, the "exhibits" in said report referred to; also certified copy of the Virginia act of assembly, passed December 12, 1865, amending and re-enacting the

act of March 22, 1861, by which the company was incorporated (and which is in evidence at page 73 of this printed case); also the act of said assembly, passed December 18, 1865, by which section 8 of said act of December 12, 1865, was amended by striking out the words "by a vote of two-thirds of the directors" and inserting instead the words "within this Commonwealth, by order of the stockholders in general meeting," but the same are here omitted by consent.)

The following is the opinion of the court referred to in the foregoing decree of December 14th, 1880:

Opinion of Court.

GLENN'S ADM'R
v.
THE NATIONAL EXPRESS AND TRANS. CO., &c.

This suit was instituted in 1871, but nothing seems to have been done in it until the spring term of this court of 1879, when leave was asked and obtained to file an amended and supplemental bill.
138 This inaction was caused, it is alleged, by reason of litigation pending in other States. But after the filing of the amended and supplemental bill, in August, 1879, the cause has been actively prosecuted by the plaintiff. As soon as it matured for hearing it was referred to one of the master commissioners of the court to ascertain and report to the court an account of the debts and liabilities of the company, and also a statement of its assets.

Due notice of the enquiries ordered to be made by the master commissioner was given by publication in a newspaper then published in the city of Richmond.

The master commissioner, after examining the books of the company and other documentary evidence and taking the depositions of numerous witnesses, has made his report, showing an aggregate indebtedness of the company on the 1st day of June, 1880, of $509,392.41.

There is no exception to this report. It appears to be correct in all respects in regard to the indebtedness of the company, and must therefore be approved and confirmed as to said indebtedness.

Regarding the indebtedness of the company as above indicated to be established, the question arises, How is it to be paid?

By a deed dated on the 20th day of September, 1866, the company conveyed all of its estate and property of every description to trustees to secure the payment of its debts, and the answer to the question just mentioned depends largely upon the validity, construction, and enforcement of that deed.

I. The court is clearly of opinion that the said deed is valid.

This corporation was chartered by the legislature of Virginia and had its principal office in the city of Richmond, the capital of the State; and though by the 8th section of the act of the incorporation power was given to two-thirds of the directors to change the locality

of the principal office without restriction as to State boundaries, yet by an amendment to the charter, passed December 18th, 1865, this was limited to removal to "some other place within this Commonwealth," and power was given to establish local offices anywhere.

This company, therefore, is a Virginia corporation, and as well by positive statute as by an inherent legal incident of its existence it is domiciled in Virginia, though it may, and was designed to, do business elsewhere as well. Bank of Augusta *v.* Earle, 13 Peters, 519; Paul *v.* Virginia, 8 Wall., 186.

The deed in question was executed, acknowledged, delivered, and recorded in the city of Richmond, Virginia, as is shown by the certificate in Richmond of the notary public, Roger J. Page, bearing even date with the deed, and by the certificate of Robert Howard, clerk of the hustings court of Richmond, of the recordation of the deed on the day following, and, as will be seen, it was executed by the president of the company by virtue and in pursuance of a resolution of the board of directors, in whom the whole management of the affairs of the company was vested, conferring upon him full authority and power for that purpose. It is therefore the deed of a Virginia corporation, under its corporate seal, and by proper authority duly made and delivered in Virginia, and its validity and effect should be determined by the laws of this State.

It purports to convey all of the property in the company in trust for the benefit of all its creditors, and this it was perfectly lawful and proper to do. It gives preferences to some creditors over others. But no law is better established in Virginia than that such preferences are legal; and this will be of no practical importance if the assets of the company be sufficient to pay its debts.

It retains for a limited time possession *of* the company of the property conveyed. But that this may be done is equally well-established law in Virginia.

After repeated decisions of the supreme court of appeals of this State establishing the validity of such deeds, the court entertains no doubt as to the legality and binding effect of this deed in all respects. The decision of the supreme court of Maryland, based upon some of these Virginia decisions, and the testimony of many of the prominent counsel of the bar of this court given as experts as to the law of Virginia in respect to this deed and establishing the validity of the deed was, in the judgment of this court, plainly and clearly correct.

See Balto. & Ohio R. R. Co. *vs.* Glenn, 28 Maryland R., 287.

II. The validity of the deed being established, the next question is, What was its legal effect; what were the terms of the conveyance and what did it convey?

It is evident from the report of the commissioner and from the face of the deed that the company was greatly embarrassed financially, and that its general and leading object in executing the deed was to dedicate all of its assets and effects of every kind to the payment of its debts. Accordingly, to accomplish this purpose, it says: "The party of the first part doth hereby grant, bargain, sell, convey,

assign, and set over unto the said parties of the second part (the trustees) all the estate, property, rights, and credits of the said party of the first part of every kind, wheresoever situated, in or out of the State of Virginia."

It is difficult to conceive of larger and more comprehensive words of description of the property and rights and credits thus conveyed and assigned. But the deed does not stop there; it proceeds to make a general enumeration of the things and rights conveyed and assigned, thus, "including leases, horses, wagons, carts, harness, office furniture, safes, chests, fixtures, and other effects and moneys payable to the company, whether on calls or assessments on the stock of the company or on notes, bills, accounts, or otherwise, which property and moneys are enumerated and set forth in a schedule to be marked A and annexed hereto as soon as can be conveniently done, but the omission of any property from such schedule is not to prevent the same from being hereby granted or assigned."

141 Here is an express enumeration of "moneys payable to the company, whether on calls or assessments of stock of the company or on bills, accounts, or otherwise," and though no schedule was ever made or annexed to the deed, yet the distinct reference to such a schedule as is described, with the statement that the "omission of any property, money, or other thing from such schedule is not to prevent the same from being hereby granted or assigned," is ample proof that it was the object, intent, and meaning of the company to convey all of its estate, rights, and credits of every kind in trust for the payment of its debts, and in the deed it made and executed it used language which has been held by the courts to be apt and sufficient to pass everything the company owned or to which it was entitled, inclusive of the estate, property, rights and credits of the company of every kind and wherever situated. See Maitland *vs.* Newton, 3 Leigh, 714, citing Comegys *vs.* Vasse, 1 Peters, 193; Mundy *vs.* Vawter, 3 Grat., 518; Griffin *vs.* Macauley, 7 Grat., 477; Wickham *vs.* Lewis, Martin & Co., 13 Grat., 427, 437, 438; Milner *vs.* Metz, 16 Peters, 221.

And the same principle seems to have prevailed in the bankrupt court, where the register assigns and conveys all the estate, real and personal, of the bankrupt. The decisions in such cases appear to be uniform that the right to receive unpaid subscriptions to the capital stock of a bankrupt corporation passes, by the act of Congress and the register's deed, to the assignee in bankruptcy. Indeed no question seems to have been made upon the subject, and the cases seem to have proceeded upon the assumption that such right was vested in the assignee. See Sanger *v.* Upton, assignee, 91 U. S. R., 56; Upton, assignee, *v.* Tribilcock, *idem*, p. 45; Turnbull *v.* Payson, 95 U. S. R., 418; Pullman *v.* Upton, 96 U. S. R., 328.

By chapter 57, section 3, p. 546, of the Code of Virginia of 1873 (which is a reprint, in this respect, of the like chapter in the Code of 1860) it is provided that "upon every subscription for

142 shares in any joint stock company (other than a bank of circulation) there shall be paid upon each share two dollars at the time of subscribing and the residue thereof as required by the

president and directors." A subscription to such stock obviously creates a debt or obligation, of which two dollars a share are payable *in presenti* and the residue *in futuro*. This residue is an express credit extended by the company to the stockholders, and the company has a plain legal statutatory right to demand payment whenever it may be needed, or, as the statute declares, "as (when) required by the president and directors;" and it is further provided by the statute—see chapter 57, section 23, p. 550, Code of 1873 (same chapter, section 21, p. 334, Code of 1860)—that if any money which any stockholder has to pay upon his shares be not paid as required by the president and directors the same, with interest thereon, may be recovered by warrant or action, according to the amount, or by motion in lieu of an action. So that the statute not only recognizes such a subscription as a debt to the company—an express credit extended by the company to the stockholders—but it provides the remedy for its recovery by legal proceedings; and, independently of the statute, it seems that on general principles such subscriptions are recognized by the courts as debts due to the company, which the company has the right to recover of the stockholders, and which are to be regarded as a fund which the corporation holds for the payment of its debts. See Marsh, &c., *v.* Burroughs, Wood's Cir. C't R., pp. 468, 479; Hatch *vs.* Dana, 101 U. S. R., pp. 210, 211.

The court is clearly of the opinion that the broad and comprehensive terms of the deed embraced the unpaid subscriptions of stock, and that it conveyed and transferred to the trustees for the purposes of the trust the right to receive, when called for, all such unpaid subscriptions, and that the deed carried all the credits belonging to the company in that respect; and the court is further of opinion that, inasmuch as the president and directors have
143 failed and omitted to make those rights and credits of the company available to its creditors by making a call and assessment upon the stockholders, it is the duty of the court, under the law, to effectuate those rights and collect and appropriate those credits in such manner and by such means as may be necessary and proper for the execution of the trusts of the said deed.

III. Having decided that the deed is valid and that it embraced all the property, rights, and credits of the company, it remains to be considered how the rights of the creditors are to be enforced. It seems, from the proceedings in this case, that the great bulk of the property, effects, and claims of the company consists of unpaid subscriptions to its capital stock, and the creditors must look entirely to this fund for the payment of their debts.

As to 80 per cent. of the stock, the subscription is wholly unpaid, and the president and board of directors have made no call or assessment on the stockholders and no order whatever in regard to the collection of any part of this unpaid subscription, and for many years they seem to have entirely abandoned the business of the company. It is charged that neither the directors nor the stockholders of the company have had a meeting for nearly fourteen years, but, although the company has ceased to do business and the president and directors no longer give attention to its affairs, the

corporation has not become extinct. Under the statute of Virginia, chapter 56, section 31, p. 543, of the Code of 1873, "such corporation may sue and be sued as before for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property, and debts among those entitled thereto," and by sect. 4 of the charter of this company (acts 1865–'6, p. 380) it is expressly provided that the president and directors of this corporation shall hold their offices for one year and until their successors are chosen, and see also to same effect chapter 57, section
144 14, Code of 1873, p. 549. Where the president and directors of the company and the stockholders of the company are in default in making provision for the payment of its debts, it is made the duty of the court to enforce payment of the stock subscriptions to an extent sufficient, with any other assets that may be in the hands of the trustees, to pay the debts of the company, the costs of suit, and the expenses incident to the execution of the trust, for it seems to be well settled that a court of equity may enforce payment of stock subscriptions, though there may have been no calls for them by the company. (Hatch *vs.* Dana, 101 U. S. R., 11 Otto, 214, 215; Thompson *vs.* Stockholders, sects. 15 and 345.)

It is to be regretted that the parties themselves have not attended to this duty. They could have acted with a knowledge of all the facts, and were in a better position and circumstances to know what was requisite and proper than a court can be. It is very clear that a call and assessment must be made on the stockholders, but it is difficult to determine what it should be.

With the lights now before the court it is deemed most advisable under all the circumstances to accept the recommendations of the commissioner in his supplemental report of December 8, 1880, which is as follows: "In my former report, filed June 19th, 1880, a statement was rendered showing that an assessment of 20 per cent. on the par value of unpaid stock, being 80 per cent. of the par value of the original stock, was considered enough to satisfy the debts due by the defendant company. This statement should be changed, I think, in two particulars: First. The assessment, whatever it be, should be laid on the par of the stock, and not on that amount less assessments heretofore made. In other words, the par or face value of the company's stock should furnish the basis of the assessment. Secondly. On reflection I am satisfied that the 20 per cent. assessment suggested, if not recommended, in my former report is too small, and that the same should be increased to 30 per cent., if such increase is within the discretionary powers of the
145 court. The reasons seem sufficiently obvious. The stockholders by whom the enormous debt of the defendant company is due are very numerous. As shown by evidence in the cause, they are widely dispersed. Many are doubtless insolvent, many dead, and consequently the proceedings necessary to enforce any assessment laid by the court must be exceptionally expensive. The assessment should provide for those costs, &c. Moreover, as many of the debtors are insolvent, any assessment aggregating the exact

amount of the defendant's liabilities would manifestly fail to satisfy them, and thus a second and perhaps a third might become necessary, each attended with its heavy costs and expenses. It would seem better, therefore, in the interest of debtor as well as creditor that an assessment should be paid at the start on which enough may be realized to satisfy the debts of the company, and this is accordingly recommended. Should more than enough be collected on a 30 per cent. assessment it will be more easy as well as less expensive to return the overplus to the stockholders than it would be (in the event of a deficiency) to collect a second one."

IV. By the answer of John Blair Hoge and the amended and supplemental answer of John J. Kelly, surviving trustees in the said deed of trust, it appears that they are so situated personally as to be unable to execute the trusts and they desire to be relieved from the office of trustee. It would be a source of satisfaction to the court if they would continue to act, but inasmuch as they decline to do so they should by proper order be removed from their said office.

It is represented to the court by the counsel for the creditors whose debts have been established that John Glenn, Esquire, of Baltimore, Maryland, is a fit and proper person to be substituted and appointed as trustee to execute the trusts of said deed, and a proper order appointing him as substituted trustee will be entered, but before he undertakes to act in the execution of the trust he will

146 be required to give bond, with good security, before the clerk of this court in the penalty of $100,000, conditioned for the faithful discharge of his duties as such substituted trustee.

He will be required from time to time to report his proceedings to the court in the execution of the trust, so that the whole trust shall be executed under the supervision of the court. He will deposit his collections, after paying the necessary costs and expenses incident to the administration of the trust, in the Planters' National Bank of Richmond to the credit of the court in this cause or in such other bank as may from time to time be designated by the court.

And the said substituted trustee shall from time to time—not omitting any period of six months—render an account of his transactions before one of the master commissioners of this court, and such commissioner will be directed, upon such settlement being made, to report the same to the court, and upon the coming in of such report as soon as sufficient sums shall be collected the court will take order as to the proper distribution of the fund among those entitled thereto.

147 And at another day, to wit:

At a chancery court of the city of Richmond continued by adjournment and held for said city on the 3d day of January, 1881.

JOHN W. WRIGHT, Sheriff of the City of Richmond, and, as Such Administrator of W. W. Glenn, Deceased, Who Sues on Behalf of Himself and Other Creditors of the National Express and Transportation Company, Pl'tffs,

against

THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, W. H. Perot, Wm. Devries, D. J. Foley, J. R. Anderson, F. P. Zimmerman, J. Carter Marbury, Wm. H. Webb, Lorenzo Norvell, M. B. Poitiaux, and John Blair Hoge and John J. Kelly, Trustees, Def'ts.

This day came John Glenn, by John Howard, his counsel, and represented to the court that he had duly executed the bond before the clerk of this court required of him as substituted trustee in the deed of trust in the proceedings mentioned in the decree entered herein on the 14th day of December, 1880, and exhibited to the court the said bond, bearing date the 31st day of December, 1880, with John M. Glenn, John C. Backus, Henrietta R. Glenn, Edward G. Kenley as sureties thereon, executing the same by said John Howard, their attorney-in-fact, and the powers of attorney from the said sureties authorizing the execution of the said bond in
148 their stead by their said attorney-in-fact, accompanied with affidavits of the several sureties, of the sufficiency of such security, and the recommendation in writing of Charles Marshall and John Howard, attorneys and counsel for the creditors of the defendant company, whose claims were established by the said decree of the 14th December, 1880, that the said sureties be accepted; and the court, being satisfied of the due execution of the said bond in all respects and of the sufficiency of the said sureties, doth hereby approve the said bond and the action of the clerk of this court in taking and accepting the same.

(Other proceedings are shown by said exemplified record to have been from time to time taken, but by consent they are here omitted.)

At a chancery court for the city of Richmond continued by adjournment and held for the said city the 14th day of May, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,

against

THE NATIONAL EXPRESS AND TRANSPORTATION Co. and *als.*, Def'ts.

This cause came on this day to be heard on the papers formerly read, and the petition of J. J. A. Trotter and the petition of John E. Hurst and others, which said petitions are hereby ordered to be filed in this cause, and the court doth adjudge, order, and de-
149 cree that John Glenn, who was appointed substituted trustee in the place of Kelly and Hoge, is hereby directed to take no further steps towards the collection of the thirty per cent. assessment against the stockholders of the defendant company until the 9th day of June, 1883, and that he shall suspend the prosecution of any suits which he may have heretofore instituted under and by virtue of the

decree of December 14th, 1880, in this cause until the said 9th day of June, 1883, and leave is given the complainant or any other party interested to answer the said petitions or either of them.

And at another day, to wit:

At a chancery court for the city of Richmond continued by adjournment and held for the said city the 9th of June, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION Co. and *als.*, Def'ts.

This cause came on to be heard — formerly read and was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that the restraining order of May 14th, 1883, be continued until the 21st day of June, 1883.

150 And at another day, to wit:

At a chancery court for the city of Richmond continued by adjournment and held for the said city this 19th of June, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION Co. & *als.*, Def'ts.

This day the Baltimore and Ohio Railroad Company, the Bank of Commerce (of Baltimore), John W. Wright, sheriff of the city of Richmond, and as such administrator of W. W. Glenn, deceased; Francis Murray, for the use of John R. Terry; Henry M. Bash, trustee for John O. Reid; Henry R. Robins and Nicholas E. Watkins, Luke H. Miller, the Philadelphia, Wilmington and Baltimore Railroad Company, the Seaboard and Roanoke Railroad Company, the Richmond and Danville Railroad Company, the Orange and Alexandria Railroad Company, the Wilmington and Weldon Railroad Company, J. T. M. Barnes, and Richard J. Allison, by leave of the court, filed their joint and several answer to the petition of John E. Hurst and others filed herein on the 14th day of May, 1883, and the said respondents, by like leave of the court, also filed their joint and several answer to the petition of J. J. A. Trotter, also filed herein on the said 14th day of May, 1884.

151 And at another day, to wit:

At a chancery court for the city of Richmond continued by adjournment and held for the said city the 30th of June, 1884.

JOHN W. WRIGHT, Sh'ff & Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION Co. & *als.*, Def'ts.

This day, by leave of the court, the Baltimore and Ohio Railroad Company, the Bank of Commerce of Baltimore, John W. Wright, sheriff, and as such administrator of W. W. Glenn, deceased, in be-

half of themselves and all other creditors of the said company whose claims are established by the said decree of December 14th, 1880, filed their joint and several answer to the petition of Thomas L. Farish and others filed in this cause, to which answer said petitioners replied generally.

152 And at another day, to wit:

At a court of chancery for the city of Richmond continued by adjournment and held for the said city the 21st of July, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Pl't'ff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Def'ts.

This cause came on this day to be heard again on the papers formerly read, the petition filed, the answers thereto, the replications to said answers, the exhibits filed, the depositions of witnesses, and was argued by counsel. On consideration whereof the court, without at present suspending the operation of the decree of December 14th, 1880, but expressly reserving for future consideration the question whether the stockholders are liable to any extent on their unpaid subscriptions for stock taken by them, and the question whether the decree of December 14th, 1880, should be set aside and the bill dismissed, and without at this time deciding or considering any question in the cause raised by the petitions or answers thereto, but reserving all such questions for future consideration and determination by the court, doth, by consent of parties to this cause, as expressed by the endorsement of their counsel hereon, adjudge, order, and decree that John Glenn, trustee, on the payment to him within six months from the date of this decree by any of the subscribers to the stock of the defendant company or by any other per-
153 son claimed to be liable on account of said stock of twenty-five per centum of the original amount of said subscription, with interest thereon at the rate of six per centum per annum from thirty days from date of this decree, with any costs incurred heretofore or by said trustee in any suit brought by him heretofore or which may hereafter be brought before tender of said twenty-five per cent. under this decree to recover of such stockholder or other party the amount for which he may be responsible on said stock under the decree in this cause, shall execute a receipt therefor to operate as a full acquittance and discharge of all persons on account of such subscription, both of the original subscribers thereto and of any assignee thereof.

And at another day, to wit:

At a court of chancery for the city of Richmond continued by adjournment and held for the said city the 13th day of December, 1883.

JOHN W. WRIGHT, Sh'ff and Adm'r, &c., Plaintiff,
against
THE NATIONAL EXPRESS & TRANSPORTATION CO. & *als.*, Defendants.

In order that all persons interested may have the opportunity to avail themselves of the compromise provided by the decree herein of July 21, 1883, if they elect so to do, it is ordered that John Glenn, trustee, do forthwith mail a copy of the said decree to every person against whom any liability is asserted in this suit; and the
154 court further orders the said John Glenn, trustee, in every case where suit may hereafter be instituted before January 21, 1884, against any person, to serve a copy of said decree of July 21, 1883, upon such person before the institution of such suit, except in cases of attachment, and in cases of attachment the said copy shall be served as soon thereafter as practicable; and said trustee is directed to report to this court how he has executed this order.

(Other proceedings are by said exemplified record shown to have been then from time to time taken, which are by consent here omitted.)

At a chancery court for the city of Richmond continued by adjournment and held for the said city March 8th, 1884.

JOHN W. WRIGHT, Sh'iff and Adm'r, &c., Pl't'ffs,
against
THE NATIONAL EXPRESS AND TRANSPORTATION CO. and *als.*, Def'ts.

The death of John W. Wright, late sheriff of the city of Richmond and, as such, administrator in Virginia of the estate of W. W. Glenn, deceased, is suggested, and, on motion of John Glenn, administrator of the said estate in Maryland, the same is committed to John Howard, Esqr., who gave bond and qualified according to law as administrator *de bonis non* of said W. W. Glenn, deceased; and
155 thereupon, on motion of said Howard, this suit is revived as to the said estate in the name of said John Howard as *of* administrator *de bonis non* of said estate — W. W. Glenn; and thereupon this cause came on again to be heard on the papers formerly read.

(The said exemplified record shows the remainder of said order and other proceedings from time to time taken, but the same are here omitted by consent.)

At a chancery court for the city of Richmond continued by adjournment and held for the said city on the same day, to wit, on the 27th of June, 1884.

On the said last-named 27th day of June, 1884—

JOHN HOWARD, Administrator, &c., Plaintiff,
against
THE NATIONAL EXPRESS & TRANSPORTATION Co. and Others, Defendants.

On motion of the plaintiff it is ordered that this cause be removed to the circuit court of Henrico county to be proceeded in, heard, and determined by that court according to law.

156 The foregoing is a true copy of all the rules and proceedings in the foregoing cause.

(Teste:) BENJ. H. BERRY, *Clerk.*

Clerk's fees, $108.06.

(Teste:) BENS. H. BERRY, *Clerk.*

In the circuit court of the county of Henrico continued by adjournment and held for said county the 1st day of July, 1884.

W. W. GLENN'S ADM'R
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

It appearing from an order of the chancery court of the city of Richmond of the 27th day of June, 1884, that this cause has been removed from the said chancery court to this court, the same is hereby ordered to be placed upon the docket of this court, to be hereafter proceeded in, heard, and determined in this court according to law.

(Other proceedings are by said exempl-fied record shown to have been from time to time taken, which are here omitted by consent.)

157 At a circuit court of the county of Henrico continued by adjournment and held for said county December 9th, 1884.

GLENN'S ADM'R and Others, Pl'ts,
against
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others, Def'ts.

It appearing to the court that this suit has abated as to the estate of the petitioner, J. A. J. Trotter, and it being represented to the court that said estate is insolvent, and that John E. Hurst and others and Thomas L. Farnish and others, stockholders, who filed petitions herein for a rehearing of the decree of December 14th, 1880, upon which the order of 21st July, 1883, was entered, have accepted the terms thereof, the petition of the said Trotter and the said petitions of the several other stockholders aforesaid are hereby dismissed and John Glenn, trustee of the defendant company, is directed to proceed to execute the said decree of December 14th, 1880, entered by

the chancery court of the city of Richmond, from which court this cause has been removed and transferred to this court according to law, as if the said order of July 21st, 1883, had never been entered

(Other proceedings are by said exemplified record shown to have been from time to time taken, which are here omitted by consent, including the evidence which shows that Joseph R. Anderson, of Richmond, was on the 1st day of November, 1866, elected to be a director of the National Express and Transportation Com-
158 pany, and that he then attended and took his seat and thereafter participated in the meeting and proceedings of the board of directors, and that William H. Perot was on said day elected to be a director and also elected to be president of the company.)

Decree of March 4, 1885, *and Opinion of Court.*

In the circuit court of Henrico county continued by adjournment and held for said county March the 4th, 1885.

In the Circuit Court of the County of Henrico.

GLENN'S ADM'R and Others
v.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

This cause came on this day to be heard on the papers formerly read and upon the petition of Thomas J. Jennings, E. B. Purcell, and Goode Bryan and the demurrer and answer thereto of the complainants and the joinder of the said petitioners in said demurrer (there being no replication to said answer) and upon exhibits and examination of witnesses filed and by consent of parties, by counsel, was set down for argument and was argued by counsel.

On consideration whereof, for reasons expressed in writing, herewith filed and made part of the record, though not to be spread upon the order book, the court doth adjudge, order, and decree that the said petition be dismissed, and that the complainants recover of the said petitioners their costs in the matter of the said petition ex-
pended. But this decree is to be without prejudice to any
159 subsequent application of the petitioners or other stockholders to reopen the decree entered in this cause on the 14th day of December, 1880, so far as may be necessary to inquire into the validity of any of the debts against said company recognized in said decree, such application to set out sufficient reason to justify the court in reopening the decree for said purpose and to be accompanied with a tender of adequate security to pay all costs awarded to any party and all damages sustained by any party by reason of such application and in other respects to abide the judgment of this court.

And liberty is given said petitioners, or any other stockholders, to take such steps as they may be advised for requiring the surviving trustees in the deed of trust in the proceedings mentioned to

render such further accounts as may be deemed proper upon like terms as are above prescribed.

And the petitioners desiring to appeal from so much of this decree as dismisses their petition with costs, the court, on their motion, suspends that portion of this decree for twenty days from the date hereof, provided the said petitioners, or some one or more of them or some one of them, shall give bond with good security, in the penalty of three thousand dollars, in the mode and with conditions prescribed by law.

GLENN'S ADM'R and Others
v.
NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others. } Opinion of Court.

This cause has been transferred to this court by order of the chancery court of Richmond of June 27th, 1884.

160 It comes before this court now upon the petition of Jennings and others, three citizens of Georgia, asking to set aside and rehear the decree of the chancery court of Richmond of December 14, 1880.

That decree established the validity of the deed of trust of the defendant company of September 20, 1866; construed the deed as a conveyance of all the property of the company, including the unpaid subscriptions of stock; approved a report of its commissioner of the debts due by the corporation, and finding, in the absence of other property of the corporation, that it was necessary for the payment of these debts to resort to the stockholders for their unpaid subscriptions; substituted a trustee for the original trustees designated in the deed, and assessing upon the stockholders a contribution of thirty per cent. of their subscription; ordered the trustee to collect the same by suit or otherwise.

The substantial justice of this decree, as to the greater part of the creditors against the corporation, and the necessity of resorting to the stockholders to pay them has not been and cannot be made matter of controversy.

It is idle to cite authorities to sustain the fundamental principle of corporation law that the unpaid subscriptions of stockholders are debts due to the corporation out of which the creditors have a right to be paid.

The only substantial objections to this decree are the allegations that the indebtedness of the corporation is less than that reported by the commissioner and confirmed by the court, and that the assessment upon the stockholders made by the court is therefore too large.

If this indebtedness of the corporation be less than the commissioner reported, it does not necessarily follow that the decree was wrong in the assessment made upon the stockholders. It is abundantly apparent that some assessment upon the stockholders was necessary.

To the extent of every dollar of their unpaid subscriptions they were holders of funds to which creditors had a right to resort. The assessment upon all of them was designated to call in these
161 funds ratably, so as to equalize between the stockholders the common burden. If the assessment decreed by the court yields too large a sum to satisfy creditors the stockholders will reclaim their overpayments if there be any overpayment. Whatever the hardship or suffering of the stockholder in making it, the rights of the creditor are of superior dignity, and, in the interest both of stockholder and of creditor, it is better to have the assessment made at once abundantly adequate to discharge the debts of the corporation. Kennedy *v.* Gibson, 8 Wall. 505. It is now very questionable whether, viewing this record in the best light for the stockholders, the assessment ordered by the decree of December, 1880, will yield the sufficient sum, and it may be that a subsequent assessment will be necessary.

The petition in this case was allowed to be filed by the chancery court of Richmond April 11th, 1884. If this order had not been entered and I were now called to consider the application to file this petition against the objections of the plaintiffs I do not think that the leave to file ought to be given.

The petitioners do not even ask to be admitted as parties to the cause. They do not even admit that they are stockholders in the company. The petitioners are residents of another State, and the enforcement of the decree of which they complain was contemplated by the decree to be had in another forum. Their language is carefully guarded, therefore, so as to reserve to themselves defenses in the courts of Georgia which the courts of Virginia, upon their own application to hear them, might reject; but, in despite of their guarded language, they have voluntarily subjected themselves to the jurisdiction of this court, and if no demurrer had been interposed and the petitioners had been required to reply to the answer and issue had been forced upon that I would have been compelled to hold them to the jurisdiction of this court and could not have dismissed them from the cause until, after enquiry before a commissioner and ascertainment of their liability, a decree could be entered against
162 them which would conclude all controversy as to them in the courts of Georgia.

But the demurrer has been interposed and no replication to the answer has been entered, and in this condition of the pleadings the case, after elaborate and able argument, has been submitted to the court.

It was practically conceded in the argument that the stockholders were not necessary parties to the case and that the decree complained of is conclusive against them when sued upon in other courts of this or any other State. If it had not been so conceded the well-considered judgment of the court of appeals of Maryland and the able and exhaustive opinion of Judge Alvey, concurred in by all of his brother judges in Glenn *v.* Williams, 60 Md., 119, would relieve me of any necessity to extend this opinion upon this point.

This opinion of the Maryland court appears to have been ac-

cepted and its judgment followed in the United States courts of Louisiana, Glenn, trustee, *v.* Soule, 22 Fed. Rep., 417, and of District of Columbia in the case of Glenn, trustee, *v.* Busey, and in a State court of California.

But it is urged that the decree against the corporation was practically a decree by default, and that the stockholders, who had no knowledge of the proceedings and no opportunity to protect their interests, should now, in the same court which rendered the decree, be permitted to be heard.

It is insisted that the corporation was never properly before the court and that the court was without jurisdiction to render the decree. If this be so, it is never too late for the court to retrace its steps, and in whatever manner the fact is brought to the attention of the court, whether by a party to the cause or the suggestion of any outsider, either as *amicus curiæ* or otherwise, it is the duty of the court *ex mero motu* to rescind its action.

I am of opinion, however, that this corporation was properly before the court. Even if we were justified in considering the corporation as having expired or dissolved, the 31st sec., 56 ch., Code of 1873, continued its existence as long as might be necessary to enforce its liabilities and distribute its property among its creditors. The proceedings by or against it were required by the statute to be the same, whether it was a "living" or, as learned counsel for petitioners phrase it, a "going" corporation or an expired corporation.

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Now, ch. 166, sec. 7, Code 1873, provides how process against a corporation must be executed. By the act of incorporation the city of Richmond was made the habitat of the principal office of the company. If the president of the company had been found here, process could have been served upon him. In his absence it could have been served upon the cashier or treasurer, and if there were none such upon a director of the company. The act further requires, in order to render the service valid, that the return should show on whom and when the service was made, and that the persons so served were residents of the sheriff's bailiwick. Now, this process was served upon M. B. Poitiaux as cashier and upon Joseph R. Anderson as director, and the officer's return shows that both of them were residents of the city of Richmond; that it was executed upon both of them in the city of Richmond, August 8, 1879, by delivering to each a copy of process, and that the president of the company was not a resident of Richmond. Both Mr. Poitiaux and Gen. Anderson appeared and answered and, while they disclaimed right to answer officially, recognized in their answer the service upon them officially of the process in the cause. Now, if Mr. Poitiaux was the cashier or treasurer of the company, service upon him was sufficient. If he was not, there was no such officer of the company within the sheriff's bailiwick and service upon a director was sufficient.

Gen. Anderson in his answer does not deny that he was a director. He admits that he had been, but states his belief that he had resigned. This answer, however, is sufficient to throw upon the plaintiffs the burden of showing that he was a director when the process

was served. With that onus upon them, the evidence in the
164 record is abundantly sufficient. Gen. Anderson appeared as director in the very last meeting of the directors which was ever held, and that meeting was subsequent to the last meeting of the stockholders. He could, therefore, never have divested himself of his official relation to the company.

As to the objection that the service of process was invalid because made by a deputy of Mr. Wright, who, as sheriff and administrator of Glenn, was plaintiff, I think it is entirely without merit. No objection of this character has ever, so far as I have heard, been made in Virginia before. It is a matter of every-day practice in every court in the Commonwealth and has been from the earliest days of the State. The concurrence of professional opinion, both of the bar and the bench, through these many years is alone sufficient to repel the idea that the practice had been in violation of law.

The summons being merely serviceable, process might, at common law, well have been executed by the sheriff himself, though plaintiff in the suit, independently of our statute authorizing a summons to be served as a notice is served, which may be and is constantly served by the plaintiff. See Sewell on Sheriff, 46 law library, 88, 89; Mayor, &c., *v.* Bubb, 1 Dowl. Practice Cases, 151; Mayor, &c., *v.* Williams, 17 E. C. L. (10 Moore), 266; Code 1873, ch. 166, § 5, § 2, § 6; ch. 163, § 1.

The corporation was then, in my opinion, undoubtedly before the court, but the answers of Poitiaux and Anderson made patent the fact that the corporation was not a going corporation, and I think that the attention of the learned chancellor ought to have been called at once to these answers and enquiry had as to the facts upon which the jurisdiction against the corporation was assailed, and when it did appear that this dormant, if not dead, corporation was before the court by service of process upon officers who disclaimed right to represent it and refused to represent it, and that, being be-
165 fore the court, creditors are asserting their right to have ascertained and determined the large amount of its asserted indebtedness, and that the only possible means of payment of their debts was by assessments on hundreds of absent stockholders, I think the court ought to have required the officers of the company upon whom process had been served to retain counsel to protect the interest of the company and its absent stockholders, with a pledge of compensation to counsel out of the assessments to be made upon these stockholders.

This, however, was not done, and the case proceeded to hearing before commissioner and court without the appearance at any stage of the investigation of any party to represent the interests of the stockholders, and resulted in the ascertainment of the decree of December, 1880, of an indebtedness of some $500,000, and the necessity of a call upon stockholders scattered throughout twenty or more States for 30 per cent. of a subscription made fifteen years before the decree, and as to which the mass of these stockholders had reason to believe that all obligations, if any, had been extinguished years ago.

There is an apparently imposing equity in the application of these petitioners; but this apparent equity depends upon the reasonable suggestion, in view of all this record, of practical injury. There are equities on the other side. The creditors of this company, whoever they may be or however large their debts, have equities very superior to those of her stockholders. The suggestion that as to any of the debts the statute of limitations could be pleaded or ought to be pleaded is without any merit. The stockholders were permitted by the company to retain the greater part of their subscriptions, but they retained it subject to call when needed to pay creditors of the company. As part of the property of the company, these unpaid subscriptions were conveyed to the original trustees for the benefit of creditors and the substituted trustee represents the beneficiaries of that dedication, or, in other words, all of the creditors of the company. The conveyance of the company made these subscriptions a trust fund, and as to no creditor can the statute of
166 limitations be pleaded in favor of this trust fund. Upon this familiar principle I hardly think it necessary to cite authorities and content myself with referring to two Virginia cases—Smith *v.* R. R. Co., 33 Grat., 617; Bowie *v.* Poor School, 75 Va., 300.

Outside of this suggestion of the statute of limitations, neither in the petition nor the argument has there been any suggestion of doubt as to the validity of the claims against the company reported by the commissioner and confirmed by the court in its decree except as to a single debt.

This is a very large claim, however, and if any of the stockholders desire to have the decree reopened for new enquiry as to its validity, and can in a subsequent petition show sufficient reasons to justify apprehension that injustice has been done in recognizing this debt, the decree now to be entered will reserve the right to make the new enquiry upon proper terms. I must say, however, that from my examination of this record, in view of the objections to the debt assigned by counsel in argument, I believe the new enquiry will result in re-establishing the claim and prove of no practical benefit to the stockholders.

It was further urged in support of the petition that the original trustees had not been required to account and have not accounted. This objection appears to have arisen from a partial examination of the record.

At the last term of this court the surviving trustees were required to account before one of the commissioners of the court, and Commissioner Leake's report under that order was presented and confirmed, showing an indebtedness of the trust to both of the surviving trustees.

If, however, any probable injustice was done to the stockholders in this settlement of the trustees' account while the corporation was practically without representation, opportunity will be afforded to reopen the accounts; but in reopening these accounts, either to surcharge and falsify the trustees' account or to assail the validity of any debt which has been recognized by the court, it is
167 only fair that the stockholders at whose instance it is done

should give security to pay any costs unnecessarily sustained by the trustees or creditors in making such further enquiry.

The amount of the indebtedness of the company recognized in the decree of December, 1880, is very large, but quite one-half of it is now the cumulation of interest upon debts which have been unpaid since 1866–'67. The principal of the indebtedness recognized by the court, when compared with the estimated indebtedness of the company by the stockholders and directors in their last official action, is very suggestive that the stockholders have suffered no wrong in the accounts taken in the cause.

From any presentation in the petition or in the argument of counsel in support of it, I cannot now see that there has been any probable injustice done to the stockholders in the ascertainment of the debts due by the company, but if there has been any the court will be held open for enquiry upon any proper showing of the necessity for such enquiry at any time before the debts are paid.

Leave to file further petitions contesting any of these debts and to assert any liability of the trustees will, therefore, be reserved in the decree for these petitioners or other stockholders, conditioned upon the assignment of adequate reasons and tender of security to abide the judgment of the court.

But no petition will be entertained to arrest or delay the enforcement of the decree of December, 1880, so far as it requires the substituted trustee to collect, by suit or otherwise, the assessment upon the stockholders of 30 per cent. of their subscription of stock. If that portion of the decree could be suspended or arrested I believe that the ultimate result would be of necessity to impose upon the now solvent stockholders the payment of an increased assessment to meet the unnecessary costs of protracted litigation and the cumulation of interest upon indisputable debts of the company. The principal of these debts was estimated at the meeting of the
168 stockholders held in this city on the 10th of October, 1866, to be, as of the 1st November, 1866, some $350,000. The decree recognizes a principal of less than $300,000. The monthly interest upon, say, only $250,000 is some $1,250, and has to be paid sooner or later by these solvent stockholders. In their interest, therefore, not less than in the interest of the creditors, I am of opinion that the decree for the collection of the assessment should be promptly and vigorously enforced.

(Other proceedings are, by said exemplified record, shown to have been from time to time taken, which are here omitted by consent.)

At a circuit court of the county of Henrico continued by adjournment and held for the said county at the court-house on Monday, the 15th day of February, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

Upon motion of the complainants, it is ordered that this cause be, and it is hereby, referred to Special Commissioner Wm. J. Leake to enquire and report with all convenient speed whether the present call and assessment upon the stockholders will realize a sufficient amount to pay the indebtedness of the company in fulfillment of the trusts of the deed, and if not what additional call and
169 assessment will be necessary to that end, including the costs and expenses of collection and of the administration of the fund.

(Other proceedings are, by said exemplified record, shown to have been from time to time taken, which are here omitted by consent.)

At a circuit court of the county of Henrico continued by adjournment and held for the said county at the court-house on Friday, the 26th day of March, 1886.

W. W. GLENN'S ADMINISTRATOR
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and *als.* } In Chancery.

This day this cause came on to be further heard upon the papers formerly read and upon the report of Special Commissioner Wm. J. Leake, filed in the clerk's office on the 13th day of March, 1886, to which there is no exception, and was argued by counsel; on consideration whereof, it appearing to the court that the debts due by the defendant company as of November 1st, 1884, principal and interest, exceeded the sum of five hundred and eighty thousand dollars ($580,000), and that the returns from the present call of thirty per cent. will probably not exceed two hundred thousand dollars ($200,000), leaving, say, three hundred and eighty thousand dollars and all interest accumulated since November 1st, 1884, and to accumulate and accruing costs and expenses still to be paid, the court is of opinion and doth accordingly order, adjudge, and decree
170 that in addition to the said call of thirty per cent. it is now necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company, and doth therefore further adjudge, order, and decree that a call and assessment be, and the same is hereby, made upon the capital stock and stockholders of the said National Express and Transportation Company of fifty per centum of the par value of the said stock, being fifty dollars ($50) on each and every share thereof, and that the stockholders of said company and each and every of them and their legal representatives and assigns be, and they are hereby, severally required to pay the several amounts hereby called for and assessed to John Glenn, of the city of Balti-

more, in the State of Maryland, substituted trustee in said deed of trust from said company of the 20th day of September, 1866, in the proceedings mentioned, and the said trustee is hereby authorized and directed to collect and receive the said call and assessment and to take such prompt steps toward that end, by suit or otherwise, and in such jurisdictions as he may be advised, and liberty is hereby reserved to the creditors and to said trustee to move the court for such further order in the premises as may be necessary and proper.

And in respect to the collections to be made under this decree the same directions are given to the said trustee as are contained in the decree of December 14th, 1880, in reference to collections to be made and the proceedings to be had thereunder.

(Other proceedings are, by said exemplified record, shown to have been from time to time taken, which are here omitted by consent, including the commissioner's report referred to in said decree and which is dated "commissioner's office, March 12, 1886.")

171 In the Circuit Court of Henrico County.

W. W. GLENN'S ADMINISTRATOR and Others
vs.
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY and Others.

STATE OF VIRGINIA, *County of Henrico,* } *To wit:*

I, W. S. Leake, clerk of the circuit court of the said county of Henrico, in the State of Virginia, do hereby certify that the foregoing is a full, true, and entire transcript of the record of the above-entitled suit of W. W. Glenn's Administrator and others *vs.* The National Express and Transportation Company and others remaining in my said court, prepared according to the orders of the court passed in the said cause on the 25th day of March, 1885, and on the 15th April, 1886.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the court-house, this 24th day of Nov'r, 1888, and in the 113 year of the Commonwealth. [SEAL.]

W. S. LEAKE, *Clerk.*

STATE OF VIRGINIA, *County of Henrico,* } *To wit:*

I, Beverley R. Wellford, Jr., only judge of the circuit court of the county of Henrico, in the State of Virginia, do certify that W. S. Leake, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same
172 the clerk of the said court, and that his said attestation is in due form.

Given under my hand and seal this 24th day of Nov'r, 1888.

B. R. WELLFORD, JR., *Judge.* [SEAL.]

STATE OF VIRGINIA, *County of Henrico,* } *To wit:*

I, W. S. Leake, clerk of the circuit court of the county of Henrico, in the State of Virginia, do hereby certify that the Honorable Beverley R. Wellford, Jr., whose genuine signature is subscribed to the annexed and foregoing certificate, was at the time of signing the same the only judge of the said court.

Given under my hand this 24th day of Nov'r, 1888.

W. S. LEAKE, *Clerk.*

(End of Exhibits G and H.)

173 Plaintiff's counsel reads the stipulation in this case, dated April 11th, 1889, marked "Exhibit I," as follows:

EXHIBIT I, C. B. C.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff, *against* SAMUEL J. HARRISON, DAVID J. GARTH, WELLington Goddin, James L. Apperson, Robert A. Lancaster, and Lewis Ginter, Defendants.	Stipulation, Marked "Exhibit I, March 24, 1890."

It is stipulated and agreed that the certified copies hereto annexed of the depositions of Samuel J. Hindes, with the Exhibit S. J. H. No. 1 thereto attached, and of William S. Whiteley, Jr., and of Hollins McKim may be read or read from by either party in evidence upon the trial of or in any proceeding in or with regard to the action above entitled in the same manner, subject to the same legal objections and exceptions, and with the same legal effect as if the originals had been read or read from and as if the said depositions of the said witnesses had been made and properly returned to the court here above styled upon a commission duly issued out of said court and in the action above entitled.

174 It is further agreed that the books of the National Express and Transportation Company in the possession of the plaintiff in this cause and which were admitted by counsel, as appears on page 11 of the depositions of Hindes and Whiteley, hereto annexed, shall also be admitted as proved in the above-entitled action, said books, or such of them as may be required by either party, to be produced at the trial of this action.

Dated New York, April 11, 1889.

REYNOLDS & HARRISON,
Attorneys for Defendant Lancaster.
WM. C. CLOPTON,
Attorney for Defendant Garth.
JOHN R. ABNEY.
Attorney for Defendant Harrison.
BURTON N. HARRISON,
Attorney for Plaintiff.

Depositions of witnesses taken before me, Charles A. Boston, of the city of Baltimore, in the State of Maryland, on the first day of November, 1887, and the other days hereinafter mentioned, in pursuance of the annexed notices, the annexed certificate of adjournment, and the annexed agreement of counsel, at the office of John Glenn, 19 W. Saratoga street, in the city of Baltimore, in the State of Maryland, between the hours of 9 a. m. and 6 p. m., and to be read in evidence in a suit in which John Glenn, trustee of the National Express and Transportation Company, is the plaintiff and Samuel J. Harrison, James L. Apperson, David J. Garth, and Lewis Ginter, survivors of themselves and Wellington Goddin, deceased, late partners doing business under the firm name and style of Harrison, Goddin and Apperson, sometimes styling themselves and doing business under the name of Harrison, Garth and Company, are defendants, and in a suit in which John Glenn, trustee of the National Express and Transportation Company, is the plaintiff and Samuel J. Harrison, James L.
175 Apperson, David J. Garth, Lewis Ginter, and Rob't A. Lancaster, survivors of themselves and Wellington Goddin, deceased, late partners doing business in the city of Richmond, in the State of Virginia, under the name and style of Harrison, Goddin and Apperson, and in the city of New York and State of New York in the name and style of Harrison, Garth and Company, are the defendants, both of which suits are now perding in the circuit court of the city of Richmond, Va.

November 1st, 1887, at the office of John Glenn, 19 W. Saratoga St., in the city of Baltimore, in the State of Maryland, at 12 m., in pursuance of the adjournment from Oct. 27th, 1887, the following deposition was taken:

Present: George G. Carey, counsel for John Glenn; Legh R. Page, counsel for Lewis Ginter and Apperson.

SAMUEL J. HINDES, having first duly affirmed, deposeth and saith, in answer to interrogatories, as follows:

Examined by Mr. CAREY:

Question 1. State your name, age, and occupation.

Answer 1. Samuel J. Hindes; I am 48 years of age, and am cashier of the Manufacturers' National Bank of Baltimore.

Ques. 2. Were you ever in the employ of McKim & Co.? If so, when, how long, and in what capacity?

Answer 2. I went with McKim & Co. May 15th, 1865, and left there in February, 1881. My position was first that of book-keeper and then that of teller.

Question 3. What is this book here produced before you?

Answer 3. The book now before me is what we call a record of purchases and sales of stocks of McKim & Co.

Question 4. In whose handwriting is this book?

Answer 4. The writing I identify as Wm. T. Dickinson's and also as my own.

176 Ques. 5. Who was Mr. Dickinson?

Answer 5. Mr. Dickinson is dead. For a time he was corresponding clerk for McKim & Co. and he also had charge of this book at times.

Question 6. Were Harrison, Garth & Co. customers and correspondents of McKim & Co.?

Answer 6. Harrison, Garth & Co., in the sense that McKim & Co. bought and sold stocks for them, were customers of McKim & Co.

Question 7. Were any purchases made on their account by McKim & Co. between May 11th, 1866, and May 24th, 1866, inclusive, of National Express & Transportation Company's stock? If so, how many shares and when?

Answer 7. Yes, sir; by the book before me there appears to have been bought on May 11th, 1866, for them 185 shares National Express and Transportation stock; in all, 355 shares, as appears in detail in the book. I have no personal recollection outside of the book.

(Here the plaintiff's counsel asked the commissioner to make an extract from the said book of the details of the said purchase and sales as read by the witness, which extract is found herewith, marked "Exhibit S. J. H. No. 1.")

Question 8. Were there any sales made by McKim & Co. of National Express & Transportation Company's stock for account of Harrison, Garth & Co.? If so, how many and when?

Answer 8. On August 10th, 1866, appears the sale of 490 shares of National Express and Transportation Company's stock for account of Harrison, Garth & Company in my own handwriting.

SAM'L J. HINDES.

Teste: CHARLES A. BOSTON.

Mr. Page asked no questions.

(Richard B. Tunstall, counsel for R. A. Lancaster, defendant in the second action above mentioned, objected to the books of McKim & Company being used as evidence against the defendants,
177 who were not shown to have been members of the firm of McKim & Co. and to have ever seen said books.)

The commission then adjourned by consent to meet, at 4 o'clock p. m. of the same day, at the same place.

November 1, 1887, at the office of John Glenn, 19 W. Saratoga St., in the city of Baltimore, in the State of Maryland, at 4 o'clock p. m., in pursuance of adjournment from 12 o'clock, same day, the following deposition was taken:

Present: George G. Carey, counsel for John Glenn; Legh R. Page, counsel for Ginter & Apperson; Richard B. Tunstall, counsel for Robert A. Lancaster.

WILLIAM S. WHITELEY, Jr., being first duly sworn, deposeth and saith, in answer to interrogatories, as follows:

By Mr. CAREY:

Question 1. State your name, age, and occupation.

Answer 1. My name is William S. Whiteley, Jr.; age, 38. I am engaged in business in Washington.

Question 2. Were you ever in the employ of McKim & Co., Baltimore, Md.? If so, in what capacity?

Answer 2. I was employed by McKim and Co. from Sept. 26th, 1865, until 1870 as a clerk.

Question 3. Will you look on p. 44, 45, 46, 47 of Transfer Book No. 2, one of the books of the National Express and Transportation Company, as admitted in evidence, and read the transfers of stock on those pages purporting to have been made by you to Harrison, Garth & Company?

Answer 3. P. 44, July 12th, 1866, 50 shares from McKim & Co.

P. 45, July 12th, 1866, 50 shares from William W. Spence.

P. 45, July 12th, 1866, 50 shares from Elkan Bramberger.

P. 45, July 12th, 1866, 25 shares from Solomon King.

178 P. 46, July 12th, 1866, 10 shares from Otho W. Hahn.

P. 46, July 12th, 1866, 50 shares from John J. Scot.

P. 46, July 12th, 1866, 50 shares from William Woodward.

P. 47, July 12th, 1866, 20 shares from B. W. Cockran.

P. 47, July 12th, 1866, 50 shares from William Fisher.

Question 4. Did you sign these transfers?

Answer 4. I did.

Question 5. Look in Certificate Book No. 4, also admitted as one of the books of the National Express and Transportation Company, and read what is contained on stubs Nos. 900, 901, 902, 903.

Answer 5. Stub No. 900, 100 shares; date, July 13th, 1866. Issued to Harrison, Garth & Company, of New York. Received certificate above described, McKim & Co., by Whiteley, July 13th, 1866.

Stub No. 901, 100 shares; date, July 13th, 1866. Issued to Harrison, Garth & Co., of New York. Received certificate as above described, McKim & Co., by W. S. Whiteley, July 13th, 1866.

Stub No. 902, 100 shares; date, July 13th, 1866. Issued to Harrison, Garth & Co., of New York. Received certificate as above described, McKim & Co., W. S. Whiteley, Jr., July 13th, 1866.

Stub No. 903, 55 shares; date, July 13th, 1866. Issued to Harrison, Garth & Co., of New York. Received certificate as above described, McKim & Co., W. S. Whiteley, July 13th, 1866.

Question 6. Did you sign these receipts?

Answer 6. I did.

Question 7. Was it your regular business to attend to the transfers of stock made through McKim & Co.?

Answer 7. It was.

Question 8. Was it your business to receipt for stock for McKim & Co.?

Answer 8. It was. Of course it was. I had to do it.
Question 9. Have you any recollection of this transfer?
Answer 9. No.

179 By Mr. TUNSTALL:

Question 10. You say you have no recollection of these transfers?
Answer 10. No.
Question 11. I suppose you have no recollection of any authority given by Harrison, Garth & Co. concerning these transfers?
Answer 11. No; but the authority under which I acted ought to be a matter of record with the company.
Question 12. Or concerning the receipts that you have read?
Answer 12. No, sir; I have no recollection of these; it was routine business. The authority under which I acted ought to be a matter of record with the company.

By Mr. CAREY:

Question 13. Would you have transferred this stock to Harrison, Garth & Co. without authority from the transferers?
Answer 13. I would not have done it; I could not have done it.

By Mr. TUNSTALL:

Question 14. Have you any recollection at all of your receiving any authority from Harrison, Garth & Co. to receive the stock in their names?
Answer 14. No; I have not.
Question 15. You were in the brokerage business for a long time, were you not?
Answer 15. Yes, sir; for some years.
Question 16. And you were acquainted with the customs of the business?
Answer 16. Yes, sir.
Question 17. Is it the custom for brokers on purchasing stock for customers to have the stock transferred at once to the name of such customers without express direction or authority therefor?

Answer 17. If stocks are not bought on a margin, if the
180 purchaser pays for them or the broker believes that he will be paid on delivery of the certificate, the stock is transferred to the name of the purchaser; otherwise it is not transferred to his name; but on a running account with customers stock is not transferred to the purchaser in the absence of express direction.

W. S. WHITELEY, JR.
Test: CHARLES A. BOSTON.
W. S. WHITELEY, JR.
Test: CHARLES A. BOSTON.

The commission then adjourned, to meet by consent at 12 m. on Wednesday, November 2d, 1887, at the same place.

The commission met at the office of John Glenn, 19 W. Saratoga St., Baltimore city, in the State of Maryland, in pursuance of the adjournment from Tuesday, November 1st, 1887, at 12 m. on Wednesday, Nov. 2, 1887, and, there being no other witnesses then to examine, adjourned *sine die*.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I, Charles A. Boston, of Baltimore city aforesaid, the person named in the agreement hereto annexed, do hereby certify that the foregoing depositions were duly taken, reduced to writing, and signed by the witnesses respectively before me at the place and the times therein mentioned, pursuant to the annexed notices.

In witness whereof I have hereunto set my hand and seal, at Baltimore city aforesaid, this 2nd day of November, A. D. 1887.

CHARLES A. BOSTON, [SEAL.]
The Person Agreed upon to Take the Above Depositions.

181 STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I, James Bond, clerk of the superior court of Baltimore city aforesaid, a court of record of said city and State, do hereby certify that Charles A. Boston, whose name is signed to the above certificate, bearing date on the 2nd day of November, A. D. 1887, has acknowledged the same to be his signature before me in my city and State aforesaid.

Given under my hand and seal of the superior court of Baltimore city this 2nd day of November, A. D. 1887.

JAMES BOND,
Clerk Superior Court of Balto. City.

In the Circuit Court of the City of Richmond, Va.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, and Lewis Ginter, Survivors of Themselves and Wellington Goddin, Late Partners Doing Business under the Firm Name and Style of Harrison, Goddin & Apperson, Sometimes Styling Themselves and Doing Business under the Name of Harrison, Garth & Co., Def'ts.

182 The defendants in the above-entitled cause and each of them will please take notice that on the 27th day of October, 1887, I shall proceed, at the office of John Glenn, No. 19 W. Saratoga St., in the city of Baltimore, State of Maryland, between the hours of 9 a. m. and 6 p. m., to take the depositions of W. S. Whiteley, Jr., Luther R. Smoot, and Samuel J. Hindes, John Glenn, Geo. W. Carey, and others, to be read as evidence in my be-

half on the trial of said cause, and that if for any reason the taking of said depositions should not be commenced on that day, or if commenced not completed, the taking of the same will be adjourned and continued from day to day and from time to time until completed.

Respectfully,

JOHN GLENN,
Trustee and Plaintiff.

Executed Octo. 22nd, 1887, by delivering to Lewis Ginter and James L. Apperson each a copy of the within.

LEWIS P. WINSTON,
Sheriff City Richmond.

Endorsement: In the circuit court of the city of Richmond, Va. John Glenn, trustee of the National Exp., &c., pl't'ff, *vs.* Samuel J. Harrison *et als.*, def'ts. Notice to d'f'ts and return of sheriff thereon, to accompany depositions of Samuel J. Hindes and Wm. S. Whiteley, Jr., returned by Charles A. Boston, commissioner to take testimony by agreement of parties.

183 In the Circuit Court of the City of Richmond, Va.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, Lewis Ginter, and Robert A. Lancaster, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners Doing Business in the City of Richmond, in the State of Virginia, in the Name and Style of Harrison, Goddin & Apperson, and in the City of New York, State of New York, in the Name and Style of Harrison, Garth & Co., Def'ts.

The defendants in the above-entitled cause and each of them will please take notice that on the 27th day of October, 1887, I shall proceed, at the office of John Glenn, No. 19 W. Saratoga St., in the city of Baltimore, State of Maryland, between the hours of 9 a. m. and 6 p. m., to take the depositions of W. S. Whiteley, Jr., Luther R. Smoot, Samuel J. Hindes, John Glenn, George W. Carey, and others, to be read as evidence in my behalf on the trial of said cause, and that if from any reason the taking of said depositions should not be commenced on that day, or if commenced not completed, the taking of the same will be adjourned and continued from day to day and from time to time until completed.

Respectfully,

JOHN GLENN,
Trustee and Plaintiff.

184 Executed Octo. 22, 1887, by delivering to Lewis Ginter, James L. Apperson, and R. A. Lancaster each a copy of the within.

LEWIS P. WINSTON,
Sheriff City Richmond.

In the Circuit Court of the City of Richmond, Va.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,

vs.

SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, and Lewis Ginter, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners Doing Business under the Firm Name and Style of Harrison, Goddin & Apperson, Sometimes Styling Themselves and Doing Business under the Name of Harrison, Garth & Co., Def'ts,

and

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,

vs.

SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, Lewis Ginter, and Robert A. Lancaster, Survivors of
185 Themselves and Wellington Goddin, Deceased, Late Partners Doing Business in the City of Richmond, in the State of Virginia, in the Name and Style of Harrison, Goddin & Apperson, and in the City of New York and State of New York in the Name and Style of Harrison, Garth & Co., Def'ts.

I hereby certify that on the 27th day of October, 1887, I was present at the office of John Glenn, 19 W. Saratoga St., in the city of Baltimore and State of Maryland, for the purpose of hearing the depositions of W. S. Whiteley, Jr., Luther R. Smoot, Samuel J. Hindes, and others in the above-entitled cases, and the hearing of the said depositions was adjourned to the 1st day of November, 1887.

GEO. McCAFFRAY,
Justice of the Peace of the State of Maryland in and for the City of Baltimore.

STATE OF MARYLAND, *Baltimore City,* } *sct:*

I hereby certify that Geo. McCaffray, Esq., who has thereto subscribed his name, was at the time of so doing a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice and verily believe the signature to be his genuine signature.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore city this 2nd day of November, A. D. 1887.

JAS. BOND,
Clerk of the Superior Court of Baltimore City.

186 In the Circuit Court of the City of Richmond, Virginia.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, and Lewis Ginter, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners Doing Business under the Firm Name and Style of Harrison, Goddin & Apperson, Sometimes Styling Themselves and Doing Business under the Name of Harrison, Garth & Co., Def'ts,

and

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, Lewis Ginter, and Robert A. Lancaster, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners
187 Doing Business in the City of Richmond under the Name and Style of Harrison, Goddin & Apperson, in the City of New York and State of New York in the Name and Style of Harrison, Garth & Co., Def'ts.

The above-named parties having met on Nov. 1st, '87, at the office of John Glenn, Balto., Md., it is hereby agreed that the depositions of W. S. Whiteley, Jr., Luther R. Smoot, Samuel J. Hindes, and others in the above-mentioned causes shall be taken before Charles A. Boston, Esq., of Baltimore, Md.

LEGH R. PAGE,
Counsel for Lewis Ginter and J. L. Apperson.
TUNSTALL & THOM,
Attorneys for R. A. Lancaster in the Second Above-Entitled Action.
GEORGE C. CAREY, JR.,
Of Counsel for Plaintiff.

In the Circuit Court of the City of Richmond, Va.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. Garth, and Lewis Ginter, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners
188 Doing Business under the Firm Name and Style of Harrison, Goddin and Apperson, Sometimes Styling Themselves and Doing Business under the Name of Harrison, Garth & Co., Def'ts,

No. 1.

and

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. Garth, Lewis Ginter, and Robert A. Lancaster, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners Doing Business in the City of Richmond under the Name and Style of Harrison, Goddin and Apperson, and in the City of New York and State of New York in the Name and Style of Harrison, Garth & Co. } No. 2.

It is hereby agreed that the books of the National Express and Transportation Company be accepted as proved to be the books of the said company.

TURNSTALL & THOM,
Att'ys for R. A. Lancaster in Action No. 2 Above.
LEGH R. PAGE,
Counsel for Lewis Ginter and J. L. Apperson in Both Suits.
GEORGE G. CAREY, JR.,
Of Counsel for Plaintiff.

189 (Endorsement on back of depositions.)

In the circuit court of the city of Richmond, Va. John Glenn, trustee of the Nat. Exp., &c., pl't'ff, *vs.* Samuel J. Harrison *et al.*, d'f'ts. Returned by Charles A. Boston, commissioner to take testimony by agreement of parties, 1887, Nov. 4. Received under cover, sealed, and filed. A. Sheild, cl'k.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, Alfred Sheild, clerk of the circuit court of the city of Richmond, in the State of Virginia, do hereby certify that the foregoing is a true transcript from the records of said court.

[SEAL.] In testimony whereof I hereto set my hand and annex the seal of the said court this 4th day of April, 1889.

ALFRED SHEILD, *Cl'k.*

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, B. R. Wellford, Jr., judge of the circuit court of the city of Richmond, in the State of Virginia, do certify that Alfred Sheild, who hath given the preceding certificate, is clerk of the said court and that his said attestation is in due form.

Given under my hand this 4th day of April, 1889.

B. R. WELLFORD, JR.

Extract from McKim & Co.'s Book Containing the Details Referred to by the Witness, Samuel J. Hindes.

Purchases of stock.

1866.	Certifs.			For %
May 11.	25 shs. N. Ex., No. 561, from Thomas & Co.	@	$1.50	Harrison, Garth & Co.
" "	60 shs. N. Ex., No. 650—50; No. 348—10, from Bros. McKim	@	1.25	" " "
" "	50 shs. N. Ex., No. 508, from Fisher	@	1.25	" " "
" "	50 shs. N. Ex., No. 568, from Fisher	@	2.00	" " "
" 12.	50 shs. N. Ex., No. 442, from Fisher	@	1.75	" " "
" 15.	50 shs. N. Ex., from Towney	@	"	" " "
" 17.	20 shs. N. Ex., No. 502, from Gildersleeve	@	2.00	" " "
" 24.	50 shs. N. Ex., No. 514, from Fisher	@	3.00	" " "

Sales of stock.

1866.				For %
Aug. 10.	40 shs. Nat. Ex. to Waters & Easter	@	$1.00	Harrison, Garth & Co.
	*450 shs. Nat. Ex. to Towney	@	50	" " "
	*50 shs. Nat. Ex. to Towney	@	"	J. Smith.

*Certifs.

900—100	shs.
901—100	"
902—100	"
903— 55	"
924—135	"
652— 10	"
500	"

Endorsed: Exhibit "S. J. H. No. 1," accompan-ing deposition of Samuel J. Hindes. Returned by Charles A. Boston, commissioned to take testimony by agreement of parties.

191 In the Circuit Court of the City of Richmond.

JOHN GLENN, Trustee of the National Express and Transportation Company, Pl'ff,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, Lewis Ginter, and Robert A. Lancaster, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners Doing Business in the City of Richmond, in the State of Virginia, in the Name of Harrison, Goddin and Apperson, and in the City of New York, State of New York, as Harrison, Garth & Co., Def'ts.

The defendants in the above-entitled cause and each of them will please take notice that on the 19th day of November, 1887, I shall proceed at the office of John Glenn, No. 19 W. Saratoga street, in the city of Baltimore, State of Maryland, to take the depositions of Hollins McKim and others before Murray Hanson, Esq., a commissioner in Maryland for the State of Virginia, to be read as evidence in my behalf on the trial of said cause, and that if from any cause the taking of the said depositions is not commenced on that day or, if commenced, not completed the taking of the *said* will be adjourned and continued from day to day and from time to time until completed.

Respectfully,

JOHN GLENN,
Trustee and Plaintiff.

192 Executed on R. A. Lancaster and J. L. Apperson Nov. 16th, 1887, by delivering to each of them a copy of the within notice, and executed the same day on Lewis Ginter by calling at his usual place of abode and, not finding him there, by delivering to a member of his family over the age of sixteen years a copy of the within notice and explaining the purport of the same.

P. P. WINSTON, *D. S.*,
For LEWIS P. WINSTON,
Sh'ff, City Richmond.

In the Circuit Court of the City of Richmond.

JOHN GLENN, Trustee of the National Express and Transportation Company,
vs.
SAMUEL J. HARRISON, JAMES L. APPERSON, DAVID J. GARTH, Lewis Ginter, and Robert A. Lancaster, Survivors of Themselves and Wellington Goddin, Deceased, Late Partners Doing Business in the City of Richmond, in the State of Virginia, in the Name of Harrison, Goddin and Apperson, and in the City of New York, State of New York, as Harrison, Garth & Co., Def'ts.

STATE OF MARYLAND, *City of Baltimore*, } *ss:*

Deposition of Hollins McKim, taken before me, Murray Han-
193 son, a commissioner of the State of Virginia in the State of Maryland, on the 18th day of November, A. D. 1887, by virtue of and in pursuance of the annexed notice, at the office of John Glenn, No. 19 West Saratoga street, in the city of Baltimore and State of Maryland, between the hours of 8 o'clock a. m. and 8 o'clock p. m. of said day, to be read as evidence on the part of the plaintiff on the trial of a certain cause now pending in the circuit court of the city of Richmond, State of Virginia, wherein John Glenn, trustee of the National Express and Transportation Company is plaintiff and Samuel J. Harrison and others are defendants.

Present: Col. Charles Marshall, att'y for plaintiff, and Mr. Tunstall, att'y for Rob't A. Lancaster.

HOLLINS MCKIM, a witness of lawful age, being by me first duly sworn according to law, deposes and says as follows:

1st question by attorney for plaintiff. State your name, age, residence, and occupation.

Answer. Hollins McKim; fifty-two years of age. I reside in Baltimore city, Maryland; banker and broker.

2nd question by same. What was your business in the year 1866?

Answer. Banker and broker.

3rd question by same. What was the name of your firm and who composed it in 1866?

Answer. McKim & Co. It was composed of William McKim, Hollins McKim, and Isaac McKim.

4th question by same. Did you know the firm of Harrison, Garth & Co., of New York, in the year 1866, and had your firm any transactions with them, and what was the nature of those transactions?

Answer. I don't think I did. We thought the firm was of Richmond. My remembrance is that they were from Richmond.

5th question by same. You did know, then, of the firm of Harrison, Garth & Co.?

Answer. Yes.

194 6th question by same. Did your firm have any business transactions with the firm of Harrison, Garth & Co. in the year 1866? If so, what was the nature of those transactions?

Answer. Yes. The transactions were in the purchase and sale of the National Express and Transportation Company's stock.

7th question by same. Can you state what number of shares of that stock you bought and sold for the account of Harrison, Garth & Co. during that year, 1866?

Answer. We purchased 355 shares and sold 490 shares.

8th question by same. Can you state whether or not Harrison,

Garth & Co. paid your firm for the stock you purchased for them and whether or not your firm accounted to Harrison, Garth & Co. for the proceeds of the stock you sold for them?

Answer. Yes, to both questions.

9th question by same. Did you render an account of your purchases and sales of that stock, and did they object in any way to said account?

Answer. We did, and they never made any objection to that account.

10th question by same. Please look at certificate No. 508 for 50 shares of said stock standing in the name of William Fisher and state in whose handwriting is the name of William S. Whiteley, Jr., on the back or the endorsement on the certificate, and answer the same question in reference to certificate No. 502 for 20 shares and certificate No. 514 for 50 shares and No. 650 for 50 shares and certificate No. 442 for 50 shares and certificate No. 348 for 10 shares and certificate No. 561 for 25 shares and certificate No. 568 for 50 shares and certificate No. 865 for 50 shares.

Answer. The name is in the handwriting of William T. Dickinson.

11th question by same. Please state who William T. Dickinson was.

Answer. Clerk of McKim and Co.

195 12th question by same. What were his duties in your office?

Answer. He was our corresponding clerk.

13th question by same. Please look at the signatures to each of the endorsements on certificates mentioned in question No. 10 and state whether you know the handwriting of said signatures.

Answer. I know the signature of William Woodward, W. W. Spence, and McKim & Co. and can identify them.

14th question by same. Please state how the order to buy and sell the stock you have mentioned was given to your firm.

Answer. My remembrance is that they were given verbally either by Mr. Harrison or Mr. Garth.

15th question by same. Was the person who gave you the orders a thin man or a stout man?

Answer. My remembrance is that he was thin.

17th question by same. Please look at the name, Wm. S. Whiteley, Jr., att'y, signed to the nine certificates of transfer in Transfer Book No. 2 of the National Express and Transportation Company now shown you and say in whose handwriting said name of Wm. S. Whileley, Jr., att'y, in each transfer is.

Answer. In the handwriting of Wm. S. Whiteley, Jr., himself.

18th question by same. Who was said Whiteley?

Answer. A clerk of McKim & Co.

19th question by same. What were his duties?

Answer. A runner and attending to stock bills.

20th question by same. Was it not one of his duties to make transfers of stock bought and sold by your firm?

Answer. I suppose so. He seems to have done it at that time. We would give it to any of our clerks to do.

21st question by same. Please look at the stubs of certificates numbers 900, 901, 902, 903, in Certificate Book No. 4 of the National Express and Transportation Company and say in whose
196 handwriting the receipts appearing on said stubs are. I mean the signature to said receipts.

Answer. They are in the handwriting of Wm. S. Whiteley, Jr.

22nd question by same. You say that you purchased for Harrison, Garth & Co. 355 shares and that you sold for them 490 shares. From whom did you receive the other 135 shares for sale?

Answer. My remembrance is that I received them from either Harrison or Garth. My remembrance is that it was the same person who gave the order to buy.

23rd question by same. Do you remember whether the 135 shares were in one or more certificates and in whose name they stood?

Answer. I have no remembrance whatever.

Cross-examination by Mr. TUNSTALL, attorney for R. A. Lancaster:

1 cross-question by same. You have stated that your firm sold 490 shares of this stock for account of Harrison, Garth & Co. Was this stock transferred from them at the time of such sale; and, if not, why not?

Answer. My remembrance was that the books were closed, and probably buyers were loath to show their names and preferred to hold the certificates in the names of the sellers. Buyers also may have feared another assessment.

2nd cross-question by same. Under these circumstances, acting for Harrison, Garth & Co., as you have stated, was it not your duty to see the stock transferred?

Answer. Not without request, as the rules of the stock exchange exempted the seller from any assessment after the sale.

3rd cross-question by same. Look at certificate No. 865 for 50 shares of said stock in the name of McKim & Co., which purports by its endorsement to have been transferred to Harrison,
197 Garth & Co., and state whether your firm of McKim and Co. have been called upon by the plaintiff to pay anything thereon; and, if so, how much have you paid thereon?

Answer. They have called upon us. We have paid thirty per cent.—that is, $1,500 and interest.

4th cross-question by same. Do you know whether anything has been paid upon the other stock standing in the name of Harrison, Garth & Co., as claimed by the plaintiff?

Answer. I think W. W. Spence has paid thirty per cent. I do not know of any other.

And further deponent saith not.

HOLLINS McKIM.

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

I, Murray Hanson, a commissioner of the State of Virginia in the State of Maryland, residing in the city of Baltimore, do hereby certify that the witness Hollins McKim was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing deposition was duly taken and reduced to writing and signed by the witness before me at the place and time therein mentioned and specified in the caption hereof pursuant to the annexed notice.

In witness whereof I have hereunto set my hand and [SEAL.] affixed my official seal, at Baltimore aforesaid, this 18th day of November, A. D. 1887.

MURRAY HANSON,
A Commissioner for Virginia in Baltimore City, Maryland.

Costs of taking deposition, $10.00, paid by pl'tff.

M. HANSON, *Com'r.*

198 (Endorsed on back:) Glenn, Jno., trustee, *vs.* Samuel J. Harrison *et als.* Depositions for plaintiff. 1887, Nov. 19th. Rec'd under cover, sealed, and filed. A. Sheild, cl'k.

STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, Alfred Sheild, clerk of the circuit court of the city of Richmond, in the State of Virginia, do hereby certify that the foregoing is a true transcript from the records of said court.

In testimony whereof I hereto set my hand and annex [SEAL.] the seal of the said court this 4th day of April, 1889.

ALFRED SHEILD, *Cl'k.*

VIRGINIA, *City of Richmond,* } *To wit:*

I, B. R. Wellford, Jr., only judge of the circuit court of the city of Richmond, in the State of Virginia, do certify that Alfred Sheild, who hath given the preceding certificate, is clerk of the said court, and that his said attestation is in due form.

Given under my hand this 4th day of April, 1889.

B. R. WELLFORD, JR.

(End of Exhibit I.)

Plaintiff's counsel proposes to read in evidence from page 8 of the stock ledger.

Defendants' counsel objects, first, that the entry is irrelevant, inadmissible, and immaterial; second, that the books of the National Express Company are not evidence against the defendants or any of them for the purpose of proving the correctness of anything contained in them.

Objection overruled and defendant excepts.

199 Entry from page eight of the stock ledger read in evidence as follows: On July 12th, 1866, transferred to Harrison, Garth & Company, of New York, from McKim & Company, transfer numbers 900, 901, 902, 903, certified number 865 for fifty shares; requisition paid, $750.

Same date transferred to the firm from William W. Spence, transfer numbers 900, 901, 902, 903, certificate number 568 for fifty shares; requisition paid, $750.

Same date transferred to the firm of Harrison, Garth & Company, New York, from Elkus & Bamberger, same transfer number, certificate number 442 for fifty shares; requisition paid, $750.

Same date transferred to the firm of Harrison, Garth & Company from Solomon King, same transfer number, certificate 561 for twenty-five shares; requisition paid, $375.

Same date transferred to the firm of Harrison, Garth & Company, of New York, from O. W. Hahn, same transfer number, certificate number 348 for ten shares; requisition, paid $150.

Same date transferred to the firm of Harrison, Garth & Company from John J. Scott, same transfer number, certificate number 650 for fifty shares; requisition paid, $650.

Same date transferred to the firm of Harrison, Garth & Company from William Woodward, same transfer number, certificate number 514; number of shares, fifty; requisition paid, $750.

Same date transferred to the firm of Harrison, Garth & Company from D. W. Cochran, same transfer number, certificate number 502 for twenty shares; requisition paid, $300.

Same date transferred to the firm of Harrison, Garth & Company from William Fisher, same transfer number, certificate number 508; number of shares, fifty; requisition paid, $750.

On July 26 transferred to the firm of Harrison, Garth &
200 Company from R. H. Strother, transfer No. 924, one hundred and thirty-five shares, on which requisition was paid, $2,025.

(The COURT (interrupting): What is the total number of these shares—how many altogether?

COUNSEL FOR PLAINTIFF: Four hundred and ninety shares.)

On the 27th of August transferred from the firm of Harrison, Garth & Company; same year, 1866, transferred to D. McElwine, 938, certificate No. 901, one hundred shares; requisition paid, $2,000.

Plaintiff's counsel offers to read the deposition of Samuel J. Hindes, already in evidence, as part of Exhibit I, pages —.

Defendant's counsel objects to it as immaterial and irrelevant. Objection overruled and defendant excepts.

Deposition then read as follows: (It is printed at pages 175, 176 of this case.)

Plaintiff's counsel also offers to read the deposition of William S. Whitely, Jr., already in evidence as part of Exhibit I, pages —.

Same objection, ruling, and exception.

Deposition then read as follows: (It is printed at pages 177–180 of this case.)

Also offers to read the deposition of Hollins McKim, already in evidence as part of Exhibit I, pages —.

Same objection, ruling, and exception.

Deposition then read as follows: (It is printed at pages 193-197 of this case.)

PLAINTIFF'S COUNSEL: All the books referred to in these depositions are here and we offer them in evidence.

Defendant's counsel objects to their admission in evidence. Objection overruled and defendants except.

Books received and marked and read in evidence.

201 SAMUEL J. HARRISON, recalled as a witness for plaintiff and examined by BURTON N. HARRISON, Esquire, of counsel for plaintiff, testified as follows:

Q. I show you a stock certificate in the name of Harrison, Garth & Company for one hundred shares of the National Express and Transportation Company stock, the certificate being numbered 901, dated July 13th, 1866, and ask you if you recognize the signatures to the endorsement on that certificate (handing witness paper).

A. Yes, sir.

Q. Whose handwriting is the name "H. N. Bullington"?

A. He was our book-keeper.

Q. Do you mean the book-keeper of Harrison, Garth & Co. at that time?

A. Yes, sir.

Q. In whose handwriting is the signature "Harrison, Garth & Co."?

A. Mr. Garth.

Q. David J. Garth, the defendant?

A. Yes, sir.

Paper offered in evidence. Same objection, ruling, and exception. Then read in evidence and marked Exhibit K as follows:

EXHIBIT K, C. B. C.

Capital, $5,000,000. Shares, $100 each.

[Revenue stamp, 25c., cancelled July 13, 1866.]

No. 901. 100 shares.

The National Express and Transportation Co. Incorporated under the laws of the State of Virginia.

202 This is to certify that Harrison, Garth & Co. are entitled to one hundred (100) shares of the capital stock of the National Express and Transportation Company, on each share of which has been paid $15.00 in cash, leaving $85.00 to be paid when called for, transferable only on the books of the company on surrender of this certificate.

Corporate Seal of the Company.

Witness the seal of the company, attested by the signatures of the president and treasurer.
Richmond, Va., July 13th, 1866.

JOHN J. KELLY,
Vice-President.

J. V. H. ALLEN, *Treasurer.*

(Endorsed.)

Know all men by these presents that we, Harrison, Garth & Co., for value received, have bargained and sold and by these presents do sell unto D. McIlvaine, of Baltimore, one hundred shares (100 shares) of the within-named company standing in our name on the books of the said company, and do hereby constitute and appoint J. V. H. Allen, of Baltimore, our true and lawful attorney irrevocably for us and in our name and stead to transfer and set over all or any part of the within shares, and for that purpose to make and execute all necessary acts of assignment and transfer, hereby ratifying and confirming all that our said attorney shall lawfully do by virtue hereof.

25c. U. S. revenue stamp, cancelled Aug. 10, 1866, by H. G. & Co.

In witness whereof we have hereunto set our hand and seal this twenty-seventh day of August, one thousand eight hundred and sixty-six.

HARRISON, GARTH & CO.

In presence of—
H. N. BULLINGTON.

203 Q. Was that the way in which Mr. Garth wrote the signature of the firm name, Harrison, Garth & Co.?
A. I really do not recollect.

Plaintiff rests.

DAVID J. GARTH, one of the defendants, being produced and duly sworn as a witness for defendants, upon his direct examination by Mr. MCFARLAND, counsel for defendants, testified as follows:

Q. Where do you reside?
A. In Westchester county, New York.
Q. Are you now in any business?
A. I am a farmer.
Q. No other business?
A. No other business.
Q. How long have you been out of business?
A. About ten years or a little more.
Q. You were a member of the firm of Harrison, Garth & Co., were you not?
A. I was.
Q. That firm was established about 1865, was it not?
A. Yes, sir; in the fall of 1865.
Q. And dissolved in February, 1867?

A. Yes, sir; it was closed up about that time or a little before.

Q. You were the liquidating partner?

A. I was.

Q. What did you do with the books and papers of the firm after the liquidation?

A. After the whole business had been settled up they were put with some other books—some six or seven years, probably, after the dissolution of the firm. I had the settlement of all the estate and settled up everything, as was supposed; everything was paid off and everything was collected that could be collected. The books were placed in a dry-goods box as being of no further use, and were left in the loft of a storehouse in Water street; I think the number was 172, if I remember aright. I was formerly in the tobacco
204 business with D. J. Garth & Company; that firm had been settled up and those books were there, and these other books were placed with them. I had no further use for either of them. I was out of business for several years; some time after these books were placed there—some time in Kentucky——

By the COURT:

Q. Tell us about these books.

A. They were left there and I thought no more of them until this suit was brought. I do not remember the date exactly of this suit. I went to look for them—this old transaction had gone out of my mind—and they were not there. They had gone, I suppose, to the junk shop or paper mill or somewhere else; I have not seen them since.

Q. All the old books and papers of Harrison, Garth & Company have disappeared?

A. They have disappeared.

Q. So that you have none of them in your possession?

A. No, sir; I have none, except I would say I have got the contract of partnership and the contract of dissolution; they were placed in my safe.

Q. Those, of course, you would preserve?

A. Yes, sir.

Q. Did the firm of Harrison, Garth & Company deal in stocks as stock brokers?

A. They were bankers and brokers in stocks, bonds, and securities.

Q. So they bought stocks for customers?

A. Yes, sir; that was our business.

Q. Like other stock brokers?

A. Yes, sir; exactly.

Q. And in the usual way of stock brokers besides?

A. Yes, sir; in the usual way.

Q. Was it any part of the business of that firm to have the stocks which you bought for customers transferred into the name of your own firm?

A. It was not.

Q. Was it the practice of the firm?

A. Never.

205 Q. Did you also, as far as you know, or any other member of your firm ever direct or authorize the transfer of the stock in question of this National Express and Transportation Company into the name of your firm?

A. Certainly not.

Q. You knew it was an assessable stock?

A. Yes, sir.

Q. Was that stock bought for any customer?

Objected to as irrelevant and immaterial. Objection overruled, and plaintiff excepts.

A. It was.

Q. For whom did you buy this stock, if for any customer?

A. It was bought for Benjamin F. Ficklin.

Q. Your firm bought it for Benjamin F. Ficklin?

A. At least I would say we agreed to carry it.

Q. Did you buy it for Ficklin's account. State what the transaction was in your own way.

A. Ficklin came to my office in the spring of the year 1866; I do not recollect the date, but it was somewhere in the spring of the year. He wanted us to carry for him about 500 shares of this National Express and Transportation Company's stock. It was a stock that was not dealt in; it was not listed on our stock exchange. It was a stock which was on the board at Baltimore, and perhaps at Richmond; I do not know about that particularly. It was certainly on the stock board at Baltimore, and Mr. Ficklin said that he could pick up the stock at Baltimore and other places, and we agreed to carry it for him—to pay for it and carry it for him upon a sufficient margin, which was lodged with us.

Q. Was it a transaction in the ordinary course of your business?

A. It was.

Q. A usual transaction?

A. Yes, sir.

Q. Buying the stock for a customer on margin and carrying it on margin?

206 A. Yes, sir; that was our regular business—stocks, bonds, and gold.

Q. Was there any agreement or understanding that the stock should be put in your name on the books of the corporation?

A. Certainly not; it was not dreamed of by us.

Q. Or in the name of your firm?

A. No, sir.

Q. What did you do with the stock afterwards?

A. We returned it to Baltimore with instructions to sell it and have it transferred from our names.

Q. How soon after you got the certificates?

A. As soon as I found out that that was the fact—that it was in our names.

Q. Just as soon as you found out that fact?

A. Yes, sir; just as soon as I found out that fact.

By the COURT:

Q. The certificates were sent to you?
A. The certificates were sent to our firm; yes, sir.
Q. By McKim?
A. I think so.
Q. By the bankers in Baltimore?
A. I think so.
Q. Who gave the order for the purchase?
A. I suppose Mr. Ficklin.
Q. You do not know whether you gave the orders or not?
A. I do not think they came from our office.
Q. What is your remembrance with reference to who gave the orders for the stocks?
A. I have no distinct recollection of that.
Q. The certificates came to you, did they?
A. The certificates came to us.
Q. How many?
A. I do not remember.
Q. For the whole of the four hundred and ninety shares?
A. I presume so.
Q. You sent them back to Ficklin?
A. I sent them back to the brokers to be sold and to be transferred from our names.

207 Q. Did not you send them back to Ficklin then?

A. No, sir; because we had paid for them and he owed us the money for them. We advised him about it and advised him to take up the stock.
Q. You did send to him?
A. Yes, sir; we notified him and required him to take the stock up and have it transferred from our names.

When further examined by counsel for defendants the witness testified as follows:

Q. You never had any personal communication with McKim & Company?
A. I never saw any member of the firm in my life. I never knew them, and never was in their house.
Q. They referred to a thin man as giving orders in respect to the purchase of this stock, and so on. Ficklin was a thin man, was he not?
A. He was a very tall man, a man six feet and two or three inches high, I should think. He was a very tall man.
Q. But you certainly had no personal communication with them?
A. No, sir.
Q. Nor any member of your firm, so far as you know?
A. I think not.
Q. Where was Ficklin at this time?
A. He was in Baltimore and in Washington, his headquarters. He was a mail contractor for the Government, a pretty large mail

contractor. Sometimes he was in Washington and sometimes in Baltimore.

Q. He is dead?

A. Yes, sir.

Q. When did he die?

A. I do not remember; it is some twenty years ago, probably.

Q. In sending these certificates of stock back to the bankers you sent the usual power of attorney in blanks?

A. Yes, sir; it had to be done.

208 Q. The stock having been put in your name you had to get it out?

A. Yes, sir; of course; that was the only way I knew of doing it.

Q. After your direction to sell the stock you never heard anything more about it?

A. I never heard anything more about it until this suit was brought.

Q. This suit was brought in December, 1886?

A. It is twenty-four years ago since the stock was sold and transferred, and I thought that was the end of it.

Q. You had nothing to do with these proceedings in Virginia personally?

A. I never had anything to do with them or heard about them.

Q. Never had anything to do with them?

A. Never.

Q. I think you said it was part of the arrangement that Ficklin himself should pick up this stock, and that you would pay for it and carry it.

A. That was the understanding.

Q. It would follow from that, I suppose, that you did not yourselves give the orders to buy; you merely received the stock after it had been bought?

A. Yes, sir.

Q. And when it came you discovered that the certificates had been issued in your name?

A. Yes, sir.

Q. I think you have already told us that you bought and sold stocks, and I suppose you bought hundreds and thousands of shares of them, did you not?

A. Yes, sir.

Q. And sometimes thousands of shares a day?

A. Yes, sir; our business ran, I suppose, from one hundred and fifty to two hundred thousand a day.

Q. Did the certificates ever come to you before in your own name in any of these transactions?

A. Not that I know of; never.

Q. This was the single instance?

A. Yes, sir.

209 When cross-examined by counsel for plaintiff the witness testified as follows:

Q. Have you a recollection now of all the various certificates rep-

resenting stock which came to the firm of Harrison, Garth & Company bought by that firm?

A. Oh, no; there were millions of dollars' worth.

Q. Am I correct in understanding you to swear deliberately that this is the only instance of all the stock dealt in by Harrison, Garth & Company in which the certificates were put in the name of the firm Harrison, Garth & Company?

A. You distinctly understand me to say that, so far as my recollection is concerned, that was the only instance.

Q. That is, so far as your recollection is concerned?

Q. Yes, sir; we dealt in stocks, bonds, and gold as other brokers did and never had them transferred in our name.

Q. What is there specially about this case which makes you remember about this case and not the others?

A. Simply because I knew this was an assessable stock, and when it came, transferred to our name, I was indignant about it; it was an unusual proceeding.

Q. Were there not many other stocks that you dealt in at that time which were not listed stocks and which were assessable?

A. Not a great many; our business was chiefly with the stock exchange.

Q. There were some?

A. Unquestionably there were. I have no particular recollection. In a large business like ours there probably were.

Q. To whom did you express your indignation, to which you have just referred?

A. I do not know. I suppose I felt indignant that the stock ought not to have been in our name.

Q. To whom did you express your indignation?

A. I do not know. I do not remember the particular in-
210 dividuals that were present. It may have been to some of the clerks. I do not remember; it is twenty-four years ago.

Q. I am not so much surprised at your lack of memory about other transactions as I am about your statement in regard to this; that is why I am asking you these questions about things that happened twenty-four years ago. You said, if I understood you, that Ficklin owed you the money for the stocks?

A. Yes, sir.

Q. How much did Ficklin owe you on that stock?

A. I do not remember; it was not a large transaction.

Q. It costs only a few dollars a share?

A. I think so.

Q. Had he paid you anything in the way of margin?

A. I think he left probably some stock with us as margin, but I do not remember about that. He certainly left some margin, but whether it was in the shape of stock or cash I do not now remember.

Q. What sort of stock did he leave with you, so far as your memory serves you?

A. I do not remember now at all; I could not say; it might have been some of this very stock.

Q. Then your recollection is that you put up all the cash for this purchase in Baltimore?

A. That is my recollection.

Q. For these 490 shares?

A. I think so.

Q. Am I correct in understanding you to say that all the certificates representing the 490 shares of stock were put into name of Harrison, Garth & Company and were received by you standing in the name of Harrison, Garth & Company?

A. I think so.

Q. And the name of the firm was endorsed to the transfer in blank on each of these certificates, was it?

A. I think it had to be so in order to get it out of our names.

Q. My recollection now is that you said on your direct examination that you signed the firm name to these blank transfers; am I correct?

211 A. I think so.

Q. Did you see Mr. Samuel J. Harrison, who was on *on* the witness stand?

A. Yes, sir.

Q. Do you remember what his appearance was in the year 1866?

A. I knew him in the year 1866.

Q. Was he as stout a man then as he is now?

A. I do not know but that he was, quite.

Q. Is he as tall a man as you are?

A. There is not very much difference; I think I am a little taller and a little slimmer.

Q. You are not quite as stout a man as he?

A. No, sir.

Q. And you were not in 1866?

A. I was not.

By the COURT:

Q. You cannot remember, you say, how many certificates you received for these 490 shares?

A. No, sir; I cannot.

Q. Did you receive all the certificates that you were entitled to at one time?

A. I do not really remember that; I think they all came about one time; I do not remember the hour of the day.

Q. Do you remember anything of an account being rendered to you by McKim & Company?

A. I do not now remember. The thing was transacted and done with and I thought that was the end of it; it is twenty-four years ago.

Q. Do you remember receiving an account from McKim & Company and paying them for the shares?

A. No, sir; I do not.

Q. As a matter of fact, did you?

A. I have no doubt I did.

Q. Did these certificates accompany the account?

A. I do not know whether they did or not; I do not remember.

Q. Did you pay the account before you ascertained with reference to what there was on the back—what name there was on the face of the certificates?

212 A. It may have been; I do not know; I do not remember particularly about that.

Q. You cannot tell about the relation of time in the transaction between the receipt of the account and the receipt of the certificates?

A. No, sir; but it must have been very close together.

When further cross-examined by counsel for plaintiff the witness testified as follows:

Q. Can you recollect how long a time elapsed between the receipt of the certificates by Harrison, Garth & Company and the sale of them by McKim & Company?

A. No, sir; I do not recollect, except from the statement of the sales of McKim from this memorandum; that was the only thing there was to recall it to my mind. I know they were sent back promptly and immediate measures were taken to have them taken out of our names as soon as possible.

By the COURT:

Q. What I want to get at is whether or not the shares were paid for to McKim before you got the certificates.

A. I do not recollect; I cannot recall the time; I know they were pretty close together.

DEFENDANTS' COUNSEL: I offer in evidence extract from the record in the Virginia proceeding showing the amount already paid in respect to assessments on the stock here in suit. I offer only so much as relates to the payment of this stock.

Read in evidence and marked Exhibit No. 1 as follows:

(The recitals of this exhibit are covered by the testimony
213 of the next witness, George G. Carey, Jr., and the exhibit is itself omitted here by consent of all the parties.)

Defendants rest.

Plaintiff's counsel offers in evidence exemplified copy of the record of the circuit court of the United States for the southern district of New York in the action removed to that court from the supreme court, city and county of New York, in which Alexander J. Meyer was plaintiff and The National Express and Transportation Company and others were defendants.

Objected to as immaterial. Objection overruled, and defendants except.

It was read in evidence and marked Exhibit L, as follows:

(This Exhibit L is a voluminous exemplification of the record in the action which was commenced in 1866 by Alexander J. Meyer in the supreme court, city and county of New York, against The National Express and Transportation Company and others, but which was removed by defendants to the circuit court of the United

States for the southern district of New York. By consent of all parties to the action now at bar great part of that record is here omitted, and it is stipulated that only the following abstract and portions of it be here printed instead of the whole exhibit:)

EXHIBIT L.

The President of the United States of America to all to whom these presents shall come, Greeting:

Know ye that we, having inspected the records and files of the circuit court of the United States for the southern district of New York, do find certain paper-writings there remaining of record in the words and figures following, to wit:

214 Supreme Court, City and County of New York.

ALEXANDER J. MEYER *against* NATIONAL EXPRESS AND TRANSPORTATION COMPANY, Joseph E. Johnston, H. G. Fant, Michael G. Harman, C. R. Mason, John Echols, William J. Hawkins, Daniel Foley, William Devries, Austin Dall, John J. Kelly, J. Blair Hoge, and C. Oliver O'Donnell.	Summons for Relief.

To the defendants:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 38 Wall street, in the city of New York, within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the said complaint within the time afore-aid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated — October, 1866.

BURRILL, DAVISON & BURRILL,
Plaintiff's Att'ys, 38 *Wall St., N. Y.*

215 (The complaint in that action was verified September 28, 1866. It alleged, among other things, the incorporation and organization of the company under the laws of Virginia; that the plaintiff was a resident and citizen of New York and a stockholder in the company; that on the 20th day of September, 1866, the company, by its president and directors, made and delivered to the defendants Hoge, Kelly, and O'Donnell, as trustees, the deed of assignment in trust which is in evidence in the action now at bar, and that the other individual defendants were officers and directors of the company. The other recitals of the complaint—those of the answer and of the various affidavits used on motions in the supreme court and all the proceedings in that court and of removal to the circuit court of the United States—sufficiently appear in the allega-

tions of the petition here next following (itself is a part of the exemplified record), on which petition Hon. William J. Wallace, circuit judge, made March 2, 1886, his order to show cause (itself a part of the exemplified record, but not here printed), bringing on the motion which resulted in the order of that court which here below follows said petition. In and by said exemplified record it appears that the amended answer of the defendants in said action was verified January 4, 1868, by William H. Perot by an affidavit by him then subscribed and sworn to, in and by which he then asserted that he, "the said Perot, is the president of the National Express and Transportation Company;" and in and by said exemplified record it further appears that the petition for removal of said action to the circuit court of the United States was verified October 7, 1870, by William H. Perot by an affidavit by him then subscribed and sworn to in terms as follows: "William H. Perot, being duly sworn, says that he is the president of The National Express and Transportation Company, one of the defendants and one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his personal knowledge.")

216 In the Circuit Court of the United States for the Southern District of New York.

ALEXANDER J. MEYER, Plaintiff,
vs.
THE NATIONAL EXPRESS & TRANSPORTATION COMPANY, Joseph E. Johnston, H. G. Fant, Michael G. Harman, C. R. Mason, John Echols, William J. Hawkins, Daniel Foley, William Devries, Austin Dall, John J. Kelly, J. Blair Hoge, and C. Oliver O'Donnell, Defendants. } Petition.

To the honorable the judges of the circuit court of the United States for the southern district of New York (sitting in equity):

The petition of John Glenn, a citizen of the State of Maryland and resident in Baltimore city, trustee as hereinafter set forth, respectfully shows to your honors—

That this action was commenced in the supreme court of the State of New York in October, 1866, by the service of a summons and complaint, several affidavits and an order of injunction, the said order being a judge's order merely and not an order of the court, and the same having been granted *ex parte* by George G. Barnard, then a justice of said court.

That, as the complaint alleges and as your petitioner is informed and believes the fact to be, the plaintiff is a citizen of and resident in the State of New York; that, as the complaint alleges and as the fact is, the said defendant The National Express and Trans-
217 portation Company is a corporation of the State of Virginia, incorporated by and organized and existing under laws of that State and having its principal office there so long as it had an office, but carrying on business in the year 1866 not only in that

State but in the State of New York and various other States as an express and transportation company; that the defendant John J. Kelly then was and now is a citizen of the State of New York, residing in the city of New York, and each of the other defendants then was and each of them now surviving still is a citizen of and resident in some one of the States other than the State of New York, as your petitioner is informed and believes; that, among other things, the complaint alleges that said The National Express and Transportation Company had been and in the year 1866 was carrying on its said business at a loss; that it was indebted to many and various persons throughout the country; that the stockholders of the company were severally liable to assessment upon their shares and had become anxious that the affairs of the company be wound up and the debts paid; that the complaint further alleges, and so the fact was, that in the State of New York and in other jurisdictions creditors of the company were proceeding to collect their demands by attachment suits and had attached the horses, wagons, and other property of the company in New York and elsewhere to satisfy their demands; that the complaint alleges further that "by the authority and sanction of the directors of said company, confirmed by a resolution for that purpose passed, the said National Express and Transportation Company made and executed under its corporate seal an instrument of assignment dated 20th of September, 1866, executed by the president of said company, purporting to assign and convey unto John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, as trustees, all the estate, property, rights, and credits of the said company of every kind, wherever situated," in trust to pay the debts of the company as therein provided; that said deed of assigment in
218 trust for the benefit of creditors was delivered on or about the said date when it was executed, and that the said complaint concludes as follows:

"Plaintiff on information and belief alleges that the said assignment or transfer is unauthorized, illegal, and void, and that it was made with the intent to hinder, delay, and defraud the stockholders and creditors of said company and in violation of the statutes of the State of New York and also of the State of Virginia.

"Plaintiff alleges that the several defendants herein other than the said Hoge and said Kelly are directors of said company, and that said Kelly is the superintendent thereof.

"Plaintiff commences this action on his own behalf and on behalf of all other stockholders of said National Express and Transportation Company who may elect to come in and contribute to the expenses of this action and avail themselves thereof.

"Plaintiff demands judgment that the said National Express and Transportation Company may be enjoined and restrained from further proceeding with or prosecuting or carrying on its business, and that it may be wound up and its business settled and its property applied to the payment of its debts, and that a receiver of the said company, its property, assets, and effects, may be appointed with such powers as the court may see fit to confer, and that the said company, its directors, officers, and agents, and each and every of

the defendants herein may be enjoined and restrained from assigning, transferring, or in any way appropriating or interfering with or disposing of the business, leases, contracts, good will, or other property, assets, or effects of the said National Express and Transportation Company, and that the property, assets, and effects of the said corporation may be collected and applied to the payment of its debts without preference or priority and without regard to the provisions or stipulations of the said assignment and by and under the directions of this honorable court and its receiver to be appointed, and that during the pendency of this action the said company, its directors, officers, and agents, may be restrained and enjoined as above provided, and that the plaintiff may have such other or further relief or judgment as may be proper and agreeable to equity." Your petitioner further shows that the said order of injunction which was served with the complaint in October, 1866, is in the terms as follows:

"On the complaint herein and the affidavit thereto annexed it is, on motion of Burrill, Davison & Burrill, plaintiff's attorneys, ordered that the defendants herein, The National Express and Transportation Company, its officers and agents, be, and they are hereby, enjoined and restrained from further prosecuting or carrying on business in the name or on account of said company, and that the said company, its directors, agents, and servants, and the several defendants herein be, and they are hereby, severally enjoined and restrained from assigning, transferring, parting with, appropriating, or in any manner disposing of the contracts, leases, debts, business or good will, or other property, assets, or effects of the said National Express and Transportation Company or in any manner interfering therewith except to preserve the same; and the said defendants, J. Blair Hoge, John J. Kelly, and C. Oliver O'Donnell, trustees named in the assignment set forth in the complaint, are hereby enjoined and restrained from taking possession of or in any manner interfering with the said property, assets, or effects of the said company, its assets, or effects under or by virtue of the said assignment or deed of trust until the further order of this court.

"GEORGE G. BARNARD, *J. S. C.*"

Your petitioner further shows that the action has never been brought to trial or, as your petitioner is informed and believes, noticed for trial, and that no receiver has ever been appointed in the action; and your petitioner further shows that, as he is informed and believes, no service of said order or of the complaint or summons was ever made upon either of the defendants, except the defendants Harman, Kelly, and Johnston, and perhaps the defendant The National Express and Transportation Company itself. Your petitioner further shows that about the time of said service, or very shortly thereafter, the said company ceased entirely to carry on business either in the State of New York or elsewhere, and the said defendants Hoge, Kelly, and O'Donnell, as such trustees as aforesaid, entered into possession of all the trust

estate, wheresoever situated, of which they could lawfully take possession, and entered upon the performance of said trust, though with many embarrassments and difficulties and subject to many delays occasioned by said order of injunction in the State of New York and like proceedings in other jurisdictions. Your petitioner further shows that the property of the said The National Express and Transportation Company in the State of New York was and such of it as now remains is personal property only, and that such of said property as now remains consists of the liability of subscribers for or holders or transferees of capital shares of the corporation only, as your petitioner is informed and believes.

3. Your petitioner further shows that, as he is informed and believes, in or about the month of November, 1866, all the defendants appeared by their attorneys in the action; extensions of time to answer were obtained, other attorneys were substituted for those who had originaly appeared for defendants, an answer and amended answer were served denying each and all the allegations in the complaint made material to the cause of action therein alleged, if any such cause of action there was, and finally, on or about the 20th day of February, 1868, a motion was by defendants' attorneys noticed for an order dissolving said injunction and vacating said order of injunction, said motion being so made upon said amended answer and various supporting affidavits; that, as your petitioner is informed and believes, the said motion came on to be heard
221 on or about April 20, 1868, before Cardozo, J., then holding special term, at chambers, of said the supreme court, who denied said motion in an opinion then endorsed upon the papers in these words:

"I think that the allegation that the assignment was made in fraud of the laws of Virginia and with fraudulent intent is not fully met, and, as I have no doubt that this court has jurisdiction so far as any property is within our State, I deny the motion;" that, as your petitioner is further informed and believes, from the order thereupon entered an appeal was taken to the general term of said the supreme court and came on to be heard on the 5th day of June, 1868—present, Barnard, Cardozo, and Sutherland, J J.—by which tribunal the said order was affirmed, Sutherland, J., delivering an opinion in which, after some remarks suggesting that the plaintiff had no right to the injunction in this case upon the ground that said court had no authority to wind up a foreign corporation, he said: "The validity of the deed of trust made in Virginia depends upon the laws of that State, but in the absence of sufficient proof as to what those laws are this court will assume that the laws of Virginia are the same as the laws of this State by which the deed is invalid, and we, therefore, affirm the decision denying the motion to vacate."

4. Your petitioner further shows that, as he is informed and believes, thereafter and on or about the 23d day of April, 1869, the motion made by the defendants for leave to renew said motion for an order dissolving said injunction came on to be heard before Cardozo, J., having been sent to him by another of the justices of

said court on whose calendar it had appeared, the same being a motion upon all the pleadings and proceedings in the action and upon additional affidavits of counsel learned in the laws of Virginia (and resident in and members of the bar of said State) that in their opinion the said deed of assignment in trust is a good, valid, and sufficient deed under the laws of said State and operates to effectually transfer to and vest in the trustees all the property and estate to which it relates, and upon further affidavits showing the
222 *bona fides* of the deed and assignment; that, as your petitioner is informed and believes, upon the hearing of said motion the same was denied by Cardozo, J., who endorsed upon the papers this opinion: "I do not think that a reargument or renewal should be granted to assist foreign trustees to remove property from our jurisdiction; motion denied." But that, as your petitioner is further informed and believes, thereafter and on or about May 13, 1869, said Cardozo, J., himself made an order requiring the plaintiff to show cause on the first Monday of June, 1869, why the defendants should not have leave to renew their said motion that the injunction be dissolved, which said order to show cause was duly served on plaintiff's attorneys, who, however, upon various excuses, induced the court to grant them one adjournment after another, and who finally (Cardozo, J., himself declining to hear the motion) procured a direction to be made that the motion be sent to George G. Barnard, J., to be heard and decided by him, and that, as your petitioner is further informed and believes, said Barnard, J., though frequently and from time to time during a number of months applied to by counsel for defendants for a hearing of the motion, as frequently and always declined to go then into the hearing, but granted the plaintiff's attorneys further adjournment. Your petitioner further shows that, as he is informed and believes, the reason why, during all said time, the action was not brought to trial by defendants was that the only parties defendant in interest were the three trustees, and they were without means to carry on the litigation and to secure the attendance of the necessary witnesses (most or all of whom resided in States other than New York and at a distance from New York) and the production of the necessary documentary evidence.

5. Your petitioner further shows that, as he is informed and believes, finally and on or about the 3d day of April, 1871, an order of said the supreme court of the State of New York was duly made and entered, upon proceedings duly taken and had by each and all the defendants other than the defendant John J.
223 Kelly, as required by the act of Congress of the United States for such case made and provided, removing this said cause and action, so far as concerns the defendants other than the defendant John J. Kelly, into your honors' circuit court of the United States in and for the southern district of New York, the district where the said suit was and is pending, and that, as your petitioner is further informed and believes, thereupon each and every other proceeding was duly taken as and when by law required to effectuate said removal and to bring the action itself and said defendants other than the defendant John J. Kelly, in so far as the action

relates to or affects them, within the jurisdiction and control of your honors' said court, where copies of, as your petitioner is informed and believes, all the pleadings, affidavits, notices, orders, and other papers and proceedings in the action remain on file, to which your petitioner now respectfully makes reference for further and fuller information as to the particulars and details of all the proceedings hereinabove recited or referred to.

6. Your petitioner further shows that, as he is informed and believes, no further proceedings have been had by the complainant in said cause since its removal into this honorable court.

That by and by reason of said injunction the company, its agents and officers, and the trustees under the deed of trust were prevented from taking the measures necessary to collect in the State of New York the debts due to said company and from making provision for the payment of the numerous creditors of the company.

7. Your petitioner further shows that after the removal of said cause to this honorable court the officers and agents of said company and the trustees named in the original bill under the deed of trust executed by said company, bearing date 20th September, 1856, ceased to take any steps or measures for the further prosecution of this cause and permitted the injunction to remain undisturbed without any steps on their part to remove it.

224 8. Your petitioner further shows that the indebtedness of said National Express and Transportation Company was and is very large; its creditors were and are very numerous, consisting for the most part of its servants and employees, residing in various States of the Union, to whom the company was indebted for services rendered in the course of its business, and including also creditors for large amounts for loans and other debts contracted by said company. He further shows that some of the creditors of said company endeavored to induce its officers and trustees under said deed of trust to take some measures whereby the large amount of unpaid subscriptions for and other liabilities concerning the stock to which said company was entitled from its stockholders might be subjected to the payment of its just debts, said unpaid subscriptions and other liabilities then constituting the sole assets of said company. He further shows that all such efforts on the part of creditors were futile, and that the officers of the company and its stockholders, especially in the State of New York, were content to leave the injunction issued in this case without any further effort to remove the same and to secure themselves during these many years from the just claims of the creditors of the company under the protection of said injunction.

9. Your petitioner further shows that all the books of said company and all its papers from which its creditors could obtain information as to the names of the stockholders and the amounts remaining unpaid by them upon their shares were removed from the State of Virginia, where said company was incorporated and had its domicile, and taken to some place to the creditors until recently unknown, so that it was impossible for them to proceed effectually to reach the unpaid subscriptions and other liabilities concerning stock

of the stockholders of said company anywhere. Under these circumstances, on the 28th of November, 1871, William W. Glenn, a citizen of the State of Maryland, who was a large judgment creditor of
225 said company, instituted a suit on his own behalf and on behalf of all other creditors of said company against said The National Express and Transportation Company and others in the chancery court of the city of Richmond, Virginia, a court of competent jurisdiction, in which suit said Glenn sought to have the question of the validity and effect of the said deed of trust executed by the National Express and Transportation Company to Hoge, Kelly, and O'Donnell judicially ascertained, and, pending the proceeding for the judicial construction of said deed, he sought to have an assessment made upon the stockholders of said company for the payment of its debts, to be collected by a receiver to be appointed by the court in said case, who should bring the money so collected into court to be applied, under its order, according as it should ultimately determine whether the said deed of trust was valid or not, to the payment of the debts of the company. Your petitioner further shows that at the time of instituting said suit it was hoped and expected that the officers of said company and said trustees could be induced to co-operate with the creditors in their efforts to procure the making of said assessment for the payment of its debts, and that through their means the books and papers necessary for ascertaining the names of the stockholders and the amounts due by them respectively and the amount of the assessment to be made upon their shares would be procured. Your petitioner shows that these hopes were disappointed, and that after long delay and ineffectual litigation in the State of Maryland with such stockholders of the company as the creditors were able to discover there, who constituted but a small part of the whole number of stockholders and whose holdings were but a small proportion of the whole amount of stock, the original bill filed in the chancery court of Richmond was amended on the 4th of August, 1879, and the said court was asked to order an account to be taken of the indebtedness of said company, to require the trustees, Hoge and Kelly (the said O'Donnell
226 having in the meantime departed this life), to deliver up and surrender the books of the company of every kind and description, to remove the said trustees from office and substitute another trustee or other trustees in their place and stead, and to require, further, that the property embraced in the deed of trust be conveyed to such substituted trustee or trustees or to a receiver or receivers to be appointed by the court. The said National Express and Transportation Company was made defendant to said suit by due process of law according to the statute of the State of Virginia. The surviving trustees subsequently voluntarily appeared as defendants, they not residing within the jurisdiction of the court and it being impossible otherwise to compel their appearance, and it was so proceeded in said cause that the said trustees in open court resigned their said trust, and, on the 14th of December, 1880, the said chancery court of the city of Richmond, after hearing all parties, upon due consideration had and despite the strenuous resistance of

shareholders of said corporation and others, passed its decree by which a large number of debts, to a very large aggregate amount, were established against said company; the deed of trust of the 20th of September, 1866, was adjudged and decreed by the court to be a valid deed of trust and legally effectual to pass to the trustees therein named and to their successor or successors in the trust all the property of said company, including the amount remaining unpaid and uncalled for in the hands of its stockholders. The resignations of the surviving trustees, John Blair Hoge and John J. Kelly, were accepted, and your petitioner was appointed to be trustee in their room to execute and perform all the provisions of the said deed of trust. Said decree further proceeded to make an assessment upon the stock and stockholders of said company of thirty per centum of the par value of said stock, and required the assessment to be paid to your petitioner as substituted trustee under said deed of trust, and authorized and directed him to collect and receive the said call and assessment and to take such steps to that end by suit or other-
227 wise in any and every jurisdiction as he should be advised.

Afterwards, on the 3d day of January, 1881, your petitioner duly qualified as trustee under said decree by filing the bond thereby required, which was approved by the court by its order passed on that day; and your petitioner thereby became entitled to all the rights and subject to all the duties and responsibilities of substituted trustee under said deed of trust of the 20th of September, 1866.

10. Your petitioner further shows that soon after said decree was made and entered in said the chancery court of the city of Richmond various stockholders attempted to have the same reviewed and opened by the court upon various pretexts, and petitions to that end were filed, the pendency of which greatly delayed the execution of his duties by your petitioner, as said trustee. A number of those petitions were disposed of by the court at various times by orders of the court dismissing them. Said cause was removed from said the chancery court of the city of Richmond to the circuit court of Henrico county, in Virginia, in due course of law, and therein the last of said petitions came on to be heard and was disposed of by the decree of the said court on the 4th of March, 1885, dismissing the same with costs. In the opinion of the court accompanying said decree it was declared to be the duty of your petitioner to proceed for the collection of the assessments promptly and vigorously.

Your petitioner further states that, under a compromise decree, passed in said cause while it was pending in the said chancery court of the city of Richmond, by consent, a considerable number of stockholders settled the claims of your petitioner, as trustee, against them under said assessment, and he received a large amount of money which was afterwards distributed under the order of said the circuit court of Henrico county; that your petitioner proceeded, as soon as he was free from the impediments caused by the petitions and obstructions of the stockholders in their efforts to reopen said de-
cree of the 14th of December, 1880, to prosecute suits against
228 the stockholders in various parts of the country as vigorously as he could and in every jurisdiction where he could proceed.

He further shows that he has recovered judgments (some of which have been paid) in various jurisdictions against stockholders and others liable under said decree and is endeavoring, by actions now pending and otherwise, to realize sufficient to pay the debts of the company as rapidly as circumstances will permit, and by the most diligent and impartial prosecution of his rights and demands as such trustee. He respectfully represents that the circumstances above referred to, particularly the withholding of the books and papers of the company, without which the enforcement of the provisions of the deed of trust and the payment of the debts of the company were impossible, sufficiently account for the long delay that has taken place. The creditors appeared as early as 1871 in the court of the domicile of the corporation which had jurisdiction of such matters, where, by law, the office of the company should have been kept and its books and papers should have been found; and the suit then instituted there for the purpose of enforcing their just rights was made fruitless for a long time by the removal theretofore made from the jurisdiction of that court of those books and vouchers, without which the courts of Virginia were wholly unable to do justice to the creditors, and it was not until 1879, when arrangements were made whereby the surrender of these books and papers was finally obtained, that it became possible for that or any court to take the necessary proceedings to secure the claims and enforce the just demands of the creditors.

11. Your petitioner is advised and believes and now alleges that the decree hereinbefore mentioned passed by said the chancery court of the city of Richmond and now removed to the circuit court of Henrico county, in Virginia, established the validity of the said the deed of trust, which was assailed by the original bill filed in this case, conclusively as against said company and against any and all its stockholders; that there is no property belonging to
229 said company except what is due to it by its stockholders, and that said deed, having been adjudicated and authoritatively declared to be valid in the place where it was executed and delivered and at the domicile of the corporation which made it, must be held to be valid everywhere, certainly so in so far as it relates to personal property; that the construction put upon said deed by said court of the State of Virginia, whereby it is declared and adjudged that the title to the unpaid subscriptions of the stockholders of the company passed to the trustees is also conclusively established by said decree as against all of said stockholders, and that the call or assessment upon said stockholders made in said cause by said court is likewise obligatory upon them, and that the appointment of your petitioner as trustee in the room of the original trustees is also conclusive upon the stockholders of the company, and that therefore your petitioner is advised and he verily believes and now alleges that the creditors of the company are entitled to have the provisions of said deed of trust enforced, and that your petitioner is entitled to have the injunction granted in this case, which has prevented the execution of said deed of trust within the limits of the State of New York and against the stockholders resident

there, dissolved, so that he may be at liberty to proceed against all persons who may be liable to pay the assessment levied by the decree passed in said cause if indeed the present continuance of said injunction is operative to restrain your petitioner in the premises.

Your petitioner files herewith a duly certified copy of the record of the proceedings of the said case in the chancery court of the city of Richmond and in said cause after its removal to said the circuit court of Henrico county, in Virginia, which he prays may be taken as a part of this his petition, and from an inspection of which the several proceedings and decrees and orders in said cause hereinbefore mentioned will more fully appear. Your petitioner prays that an order may be passed making him a party defendant in
230 this cause, and that the injunction heretofore granted may be dissolved and the order granting said injunction be vacated and the bill of complaint be dismissed, and for such other and further relief as may be proper.

And your petitioner will ever pray, etc.

JOHN GLENN, *Trustee.*

DISTRICT OF MARYLAND, *Baltimore City,* } *ss:*

John Glenn, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN GLENN.

Sworn to before me this 20th day of February, 1886.

[COMM'R'S L. S.] In testimony whereof witness my hand and seal the day and date last above mentioned.

ISAAC BROOKS, JR.,
United States Commissioner in and for the District of Maryland.

231 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-house, in the city of New York, on the 2nd day of April, 1886.

Present: Hon. William J. Wallace, circuit judge.

In the Circuit Court of the United States for the Southern District of New York. In Equity.

ALEXANDER J. MEYER, Plaintiff,
against
THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, JOSEPH E. JOHNSTON, H. G. FANT, MICHAEL G. HARMAN, C. R. MASON, JOHN ECHOLS, WILLIAM J. HAWKINS, DANIEL FOLEY, WILLIAM DEVRIES, AUSTIN DALL, JOHN J. KELLY, J. BLAIR HOGE, and C. OLIVER O'DONNELL, Defendants.

An order to show cause having been heretofore and on the 2nd of March, 1886, made by Wallace, J., in this suit, upon the petition

of John Glenn, trustee, thereto annexed, and the certified copy, thereto also annexed, of the proceedings in the said petition referred to as theretofore had in the cause in the said petition mentioned in the chancery court of the city of Richmond, in the State of
232 Virginia, and in the said cause after its removal to the circuit court of Henrico county, in said State of Virginia, and upon the pleadings and all the proceedings in this suit itself, whether before or after it was removed into this court from the supreme court of the State of New York, which said order required the plaintiff or his attorneys or counsel for him to show cause at a circuit court of the United States for the southern district of New York for hearing and disposing of motions, to be held in the court-house, in the city of New York, on the 5th day of March, 1886, at 11 o'clock in the forenoon of said day, why the prayer of said petition should not be granted and why the petitioner should not be made a party defendant in this suit and should not have leave to renew the motion heretofore made in the supreme court of the State of New York for an order dissolving the injunction in the petition mentioned, and why said order of injunction should not be vacated and set aside and said injunction dissolved, and why the petitioner should not have leave to proceed in the performance of the duties of his trust by collecting the trust fund and applying it as required, and by commencing and prosecuting such actions, suits, or other proceedings at law or in equity as he may be advised for such collections, and why the bill of complaint in this suit and this suit itself should not be dismissed for the reason that the suit has not been tried or brought to trial during so many years now elapsed since the suit was commenced, and why the petitioner should not have such further or other relief by the order of this court as to the court should seem just; and on the 5th day of March, 1886, the return day of said order to show cause, the said motion having been called in its regular order upon the motion calendar, and Mr. Harrison having then appeared for the petitioner and the motion, and Mr. Burrill having then appeared and applied for an adjournment of the motion upon the ground that the order to show cause and the papers thereto annexed had been served only on the second day of March, 1886, and it had been impossible since then to determine whether to oppose
233 the motion or what course to pursue with regard to it, and the motion having been thereupon adjourned to this day, and the motion having been now again called in its regular order upon the calendar:

Now, therefore, upon reading and filing the said order to show cause, and the said petition thereto annexed, and the said certified copy of the said record of proceedings in said courts of the State of Virginia, which is also annexed to said order to show cause, and upon reading and filing also the affidavit of Harry Goodrich, verified March 5, 1886, of service March 2, 1886, of said order to show cause, petition, and certified record, as by said order to show cause directed, and upon all the pleadings and proceedings in this suit itself, from which it appears that the suit was commenced in the supreme court of the State of New York in October, 1866, by the

service of a summons and complaint, several affidavits, and an order of injunction, the said order being a judge's order merely, and not an order of the court, the same having been granted *ex parte* by Barnard, J., then a justice of said court; that in November, 1870, the cause was removed into this court as against the several defendants other than John J. Kelly, and that the cause has never been tried or brought to trial; and after hearing Burton N. Harrison, Esq., of counsel for the petitioner, in favor of the motion, and no one appearing in opposition, and due consideration having been had, it is—

Ordered that said motion be, and hereby is, granted; that the petitioner, John Glenn, as trustee, be, and hereby is, admitted to be, and is hereby, made a party defendant in this suit; that he have leave hereby given to renew the motion heretofore made in the supreme court of the State of New York for an order dissolving said injunction; that said order of injunction be, and hereby is, vacated and set aside, and said injunction be, and hereby is, dissolved so far as concerns the defendants other than John J. Kelly; that the petitioner have leave hereby given to him to proceed to the performance of the duties of his trust by collecting the trust fund and applying it as required and by commencing and prosecuting such
234 actions, suits, or other proceedings at law or in equity as he may be advised for such collections; and that the bill of complaint in this suit and the suit itself be, and hereby is, dismissed so far as concerns the defendants other than John J. Kelly, for the reason that it has not been tried or brought to trial during so many years now elapsed since the suit was commenced.

WM. J. WALLACE.

All of which we have caused by these presents to be exemplified and the seal of the said circuit court to be hereunto affixed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of New York, in the southern district of New York, this seventh day of February, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the one hundred and fourteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

I, E. Henry Lacombe, judge of the said circuit court, do hereby certify that the foregoing exemplification is in due form of law.

E. HENRY LACOMBE.

(End of Exhibit L.)

GEORGE G. CAREY, JR., called as a witness for the plaintiff, being duly sworn, upon his direct examination, by counsel for plaintiff, testified as follows:

Q. Where do you reside?

A. Baltimore, Maryland.

Q. What is your occupation?

A. I am an attorney-at-law and I am also employed by Mr. Glenn to act as secretary in his National Express and Transportation Company's matters.

Q. To act as secretary of Mr. Glenn as trustee, under the decree of the Virginia court?

A. Yes, sir.

Q. And you are actually employed in that occupation last mentioned?

235 A. I am.

Q. Have you made a computation of the amounts charged by John Glenn, as plaintiff in this case, against Harrison, Garth & Company upon the shares here testified about—the four hundred and ninety shares?

A. I have, after making the deductions of the amounts paid by Spence and McKim.

Q. Have you been present in court all day to-day during the trial of this case?

A. Yes; except that at the beginning I went out to get some books. I know all about the testimony in the case.

Q. Were you present when the depositions were read with regard to the transactions of McKim & Company?

A. I was.

Q. What is your computation now of the amounts and interest to date of the two assessments—one of thirty per cent. and the other of fifty per cent.—by the decrees of the Virginia courts on the stock held by Harrison, Garth & Company—four hundred and ninety shares—making the deductions which are mentioned in McKim's testimony?

A. The original amount of four hundred and ninety shares—I have deducted from that one hundred shares and then calculated the thirty per cent. call assessment on three hundred and ninety shares.

Q. Why did you deduct that one hundred?

A. Because both McKim and Spence had paid thirty per cent. on fifty shares each.

Q. Then you calculated the thirty per cent. assessment on three hundred and ninety shares as still claimed to be due by Harrison, Garth & Company?

A. Yes, sir; that made $11,700, and interest from December 14th, 1880, to March 14th, 1890, is $6,403.50, making the total for that assessment and interest on that assessment $18,103.50.

Q. After calculating the amount of assessment under the decree which levied the fifty per cent. assessment what did you make that amount?

236 A. On the fifty per cent. I merely deducted fifty shares from the four hundred and ninety, because McKim had not paid on his fifty shares—on that fifty per cent. assessment.

Q. Spence did?

A. Spence did, and that left four hundred and forty shares. I calculated fifty per cent. assessment on four hundred and forty shares and made $22,000, and interest from March 26th, 1886, to date, $5,280, making in all $27,280.

Q. And now add the two assessments?

A. Adding the two assessments and interest together I make

$45,473.50 to date, with interest calculated at six per cent. I suppose that is the legal rate in New York.

Q. That is the amount upon the testimony offered on behalf of the plaintiff here to-day?

A. Yes, sir.

When cross-examined by counsel for defendants the witness testified as follows:

Q. In making that calculation have you made any allowance for the amounts paid by Elkus & Bamberger?

A. I have not. I have not made any allowance except what I have testified to—McKim and Spence.

Q. And Solomon King?

A. I have made no allowance except for McKim and Spence.

Q. As secretary for Mr. Glenn, are you not aware of the fact that Cochran, Bamberger and King did make payments?

A. I could not state that they did of my own knowledge. I am inclined to think they did.

Q. We have here the certified record which is in evidence already, and it shows the gentlemen have paid. Look at it (handing witness paper).

A. I am inclined to think that Bamberger settled under that compromise decree of July 21st, 1883, and that Cochran did the same. I could not testify to this from my own personal memory. I could testify from making an examination of the books. I have
237 only been with Mr. Glenn since 1886. June 7th, 1886, was the first time I had anything to do for the National Express and Transportation Company, and these payments were made prior to my having anything to do with it. I am inclined to think, from my memory, by these book, that these payments were made, and I have no doubt they were; but that is the reason I objected to testifying as to what payments had been made; but I should be very glad to furnish you with a statement of what has been paid.

The court then adjourned for the day.

MARCH 25TH, 1890.

GEORGE G. CAREY, JR., recalled, and, upon his further examination by counsel for plaintiff, testified as follows:

Q. Will you give the information which was requested while you were on the witness stand immediately before the adjournment of the court yesterday in reference to certain deductions to be made because of payments on transfers of stock which had been held by Harrison, Garth & Co.?

A. In order to do that I have prepared an entirely new statement showing what moneys have been paid and what stock has not been paid on. I will just read the statement (reading): Thirty per cent. paid by McKim & Company on fifty shares, W. W. Spence on fifty shares, Bamberger, fifty shares; Solomon King on twenty-five shares, Cochran on twenty shares, William Fisher on fifty shares, making two hundred and forty-five shares which have been paid on

on the thirty per cent. call, leaving two hundred and forty-five which have not been paid on. There were four hundred and ninety altogether. That left two hundred and forty-five on the thirty per cent. which had not been paid on, and two hundred and forty-five at thirty per cent. is $7,350, and the interest on that I calculated $4,091.50, making $11,441.50, principal and interest, on the
238 thirty per cent. call unpaid. That is subject to a slight deduction. I will explain that afterwards. On the fifty per cent. call Spence paid on fifty shares, Bamberger on fifty, King on twenty-five, Cochran twenty, making in all one hundred and forty-five, which have been paid on on the fifty per cent. call, leaving three hundred and forty-five which have not been paid on on the fifty per cent. call. Calculating the fifty per cent. call on three hundred and forty-five makes $17,250; then interest from March 26th, 1886, is $3,140, making $20,390 due on the fifty per cent. call. Now, John J. Scott, whom I have treated as not having paid either his thirty or fifty call, paid $2,000 on account under a special compromise decree of January 17th, 1887. He paid that on January 31st, 1887. He paid that on two hundred shares, fifty of which shares subsequently went to Harrison, Garth & Company. Therefore I allowed him $1,000 on fifty shares paid, and calculated interest from the date of his payment up to date, and deducted that $1,000 and the interest from the amount which is calculated to be due from Harrison, Garth & Company, leaving the amount $40,641.50, being the total amount Harrison, Garth & Company owe on the thirty and fifty per cent. assessments.

By the COURT:

Q. That is the amount of the claim as it stands to-day, principal and interest?

A. Yes, sir; to the best of my knowledge. I have been over the accounts and everything very carefully.

Written statement of witness put in evidence and marked Exhibit M.

PLAINTIFF'S EXHIBIT M, A. B. C.

30% paid.		30% not paid.	
McKim & Co.	50	Hahn	10
Spence	50	Scott	50
Bamberger	50	Woodward	50
King	25	Strother	135
Corkran	20		
Fisher	50		245
	245		

239 245 @ 30%—$7,350.

30% decree Dec. 14, 1880, to March 14, 1890; 9 yrs., 3 mos., 10 da. @ 6% on $7,350—$4,091.50.

$7,350
4,091 50

$11,441 50 prin. & int. on 30% call.

50% paid.		50% not paid.	
Spence	50	McKim	50
Bamberger	50	Hahn	10
King	25	Scott	50
Corkran	20	Woodward	50
	145	Fisher	50
		Strother	135
			345

345 @ 50%—$17,250.

50% decree M'ch 26, '86, to M'ch 26, '90; 4 yrs., @ 6% on $17,250—3,140.

Scott p'd $1,000 on 20 shs. Jan. 31, '89.

Comp. dec. of Jan. 17, '87.

$1,000 & int. to M'ch 24, '90—$1,190.

$17,250
3,140

$20,390 prin. & int. on 50% call.
11,441 50 prin. & int. on 30% call.

$31,831 50
1,190 amt. & int. p'd by Scott.

$30.641 50

Plaintiff rests.

Defendants rest.

Mr. MacFarland, counsel for the defendants David J. Garth and Lancaster, moves for a nonsuit.

Motion denied and said defendants except.

240 Mr. Abney, counsel for the defendant Samuel J. Harrison, also moves for nonsuit.

Motion denied. Exception.

The court directs the jury to find a verdict in favor of the plaintiff for the sum of $30,641.50, to which direction each of the said defendants separately excepts.

The jury accordingly found a verdict for the plaintiff in the sum of $30,641.50.

Supreme Court, Circuit Part II, March 25th, 1890.

JOHN GLENN
against
DAVID J. GARTH *et al.*
} Present: Hon. Edward Patterson, Justice.

I hereby certify that this cause was this day tried by the court and a jury and a verdict rendered therein by direction of the court in favor of the plaintiff for the sum of $30,641.50; exceptions to be heard in the first instance at the general term.

EDWARD REILLY, *Clerk.*

241 At a circuit court, part II, held in and for the county of New York, at the county court-house, in the city of New York, on the 25th day of March, 1890.

Present: Hon. Edward Patterson, a justice.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter, Defendants.
} Order.

The issues in this cause having been brought to trial at this circuit court, part II, held in and for the county of New York, and having been this day tried by the court and a jury and a verdict having been rendered therein by direction of the court in favor of the plaintiff and against the defendants David J. Garth, Robert A. Lancaster, and Samuel J. Harrison for the sum of thirty thousand six hundred and forty-one $\frac{50}{100}$ ($30,641.50) dollars, and the said defendants against whom said verdict was so rendered having taken exceptions to said direction of the verdict and to rulings made on the trial and having now applied for an order that the exceptions so taken be heard in the first instance at the general term, and that judgment be suspended in the meantime—

242

Now, therefore, after hearing William W. MacFarland, Esquire, of counsel for said defendants Garth and Lancaster, and John R. Abney, Esquire, of counsel for said defendant Harrison, in support of said application, and hearing also John Howard, Esquire, of counsel for the plaintiff, in opposition, and due consideration having been had, it is—

Ordered that the exceptions be heard in the first instance at the general term, and that judgment be suspended in the meantime.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of, &c., of the National Express and Transportation Company, Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, WELLINGTON Goddin, James L. Apperson, Robert A. Lancaster, and Lewis Ginter, Defendants.

Stipulation.

It is hereby stipulated and consented by and between the several parties to this action that upon any argument or appearance in this action all or any of the provisions of any of the laws of the
243 State of Virginia may be read, cited, or referred to by counsel for either party with the same force and effect as if the same had been set forth at length in the case containing exceptions on which the cause will be heard at the general term and proved in evidence on the trial of the issues at the circuit —, March 25, 1890, including all facts relating to the history of this case.

Dated May 13, 1891.

WM. C. CLOPTON,
Attorney for Defendant Garth.
REYNOLDS & HARRISON,
Attorneys for Defendant Lancaster.
JOHN R. ABNEY,
Attorney for Defendant Harrison.
BURTON N. HARRISON,
Attorney for Plaintiff.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of, &c., of the National Express and Transportation Company, Plaintiff,
against
SAMUEL J. HARRISON, DAVID J. GARTH, Wellington Goddin, James L. Apperson, Robert A. Lancaster, and Lewis Ginter, Defendants.

Notice of Motion at General Term for New Trial on Exceptions.

Please take notice that the exceptions taken by the defend-
244 ants upon the trial of the issues at the circuit will be brought to a hearing at the general term to be held in and for the first department, at the county court-house, in the city of New York, on the 1st day of June, 1891, at the opening of the court on that day or as soon thereafter as counsel can be heard, and that on said exceptions the undersigned will then and there move the court at the said general term for an order setting aside the verdict for $30,641.50 in favor of the plaintiff and against said defendants and for a new trial.

Yours, &c.,

WILLIAM C. CLOPTON,
Attorney for Defendant Garth.
REYNOLDS & HARRISON,
Attorneys for Defendant Lancaster.
JOHN R. ABNEY,
Attorney for Defendant Harrison.

To Burton N. Harrison, Esq., attorney for plaintiff.

245 At a general term of the supreme court, held in and for the first department at the county court-house, in the city of New York, on the 10th day of June, 1891.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. George C. Barrett, J.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
DAVID J. GARTH, ROBERT A. LANCASTER, Samuel J. Harrison, Wellington Goddin, James L. Apperson, and Lewis Ginter, Defendants.

Order Sustaining Exceptions and Granting a New Trial.

The issues in this action having been tried at a circuit court, part II, held at the city of New York, in and for the county of New York, on the 24th and 25th days of March, 1890, before Hon. Edward Patterson, a justice of the supreme court, duly assigned to hold said circuit court, and a jury, and a verdict having been, by direction of the court, rendered by the jury on said 25th day of March, 1890, in favor of the plaintiff and against the defendant David J. Garth, Robert A. Lancaster, and Samuel J. Harrison for the

246 sum of thirty-six thousand six hundred and forty-one $\frac{50}{100}$ ($30,641.50) dollars, and the court having then ordered the exceptions taken by said defendants on the trial to be heard in the first instance at the general term, and that judgment be suspended in the meantime, and the said defendants having moved at the general term upon the said exceptions for an order setting aside the said verdict and for a new trial:

Now, therefore, upon reading and filing the case made and settled containing said exceptions, and after hearing William W. McFarland, William C. Clopton, and Robert L. Harrison, Esqs., of counsel for the defendants Garth and Lancaster, and John R. Abney, Esq., of counsel for the defendant Harrison, in support of the said motion made by said defendants, and after hearing also John Howard and Burton N. Harrison, Esqs., of counsel for the plaintiff, in opposition to said motion, and due consideration having been had, it is—

Ordered that the said motion so made by the said defendants be, and hereby is, granted; and it is—

Further ordered that the exceptions taken by the said defendants at the trial be, and hereby are, sustained, and that the said verdict be, and hereby is, set aside, and that a new trial be, and hereby is, granted, with costs to abide the event.

247 Supreme Court.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff and Appellant,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and Samuel J. Harrison, Impleaded with Others, Defendants and Respondents.

Notice of Appeal to the Court of Appeals.

Please take notice that the plaintiff above named appeals to the court of appeals from the order made by the general term of the supreme court in the first department, dated June 10, 1891, and entered in the office of the clerk of the supreme court and of the county of New York, in the county court-house, in the city of New York, on the 30th day of June, 1891, whereby the motion of the defendants above named, which had been heard at said general term, for a new trial upon the exceptions by said defendants, taken at the trial at circuit, was granted, and the said exceptions were sustained, and the verdict of the jury, rendered by direction of the court March 25, 1890, in favor of the plaintiff and against the said defendants was set aside and a new trial was granted, and that the plaintiff appeals to said the court of appeals from each and every part and provision of said order. You will please take notice further that the appellant assents, and it is hereby assented on the part of the appellant that if the order appealed from is affirmed
248 judgment absolute shall be rendered against the appellant.

Dated New York, August 6, 1891.

Yours, &c., BURTON N. HARRISON,
Attorney for Plaintiff, Appellant.

Office and post-office address, 120 Broadway, New York city.

To William C. Clopton, Esq., attorney for defendant Garth; Messrs. Reynolds & Harrison and Robert L. Harrison, Esq., attorneys for defendant Lancaster; John R. Abney, Esq., attorney for defendant Harrison, and to Leonard A. Giegerich, Esq., clerk, &c., &c.

We, the undersigned, the attorneys respectively for all the parties interested, hereby stipulate in writing that the foregoing is a true and correct copy of the notice of appeal, the order appealed from, and the papers upon which the court below (the general term) acted in making the said order. We further stipulate that the clerk shall not be required to certify the said papers, but that the papers so proved by this stipulation shall be received by the clerks of all the courts and by the courts and shall be used and filed with the same force and effect as if certified by a clerk of the supreme court.

Dated New York, October 24, 1891.

BURTON N. HARRISON,
Att'y for Pl't'ff, Appellant.
JOHN R. ABNEY,
Att'y for Respondent Harrison.
ROBERT L. HARRISON
(REYNOLDS & HARRISON),
Att'y for Resp't Lancaster.
WM. C. CLOPTON,
Att'y for Def't Garth.

249 Supreme Court.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and Samuel J. Harrison, Impleaded with Others, Defendants.

Opinion of Court at General Term.

BARRETT, *J.*:

A great many important questions are presented by this appeal, but, in the view which we take of the primary fact, it will not be necessary to consider them.

Upon a careful review of all the evidence adduced upon the trial, we are of opinion that the defendants never became stockholders of the corporation represented by the plaintiff, and consequently are not responsible for the unpaid assessment sought to be recovered in this action. The shares in question were never purchased by the defendants' firm (Harrison, Garth & Co.). This firm was engaged in the business of bankers and brokers in stocks, bonds, and securities in this city. They had a customer named Ficklin, who desired to purchase these shares upon a margin. Mr. Garth was the particular member of the firm who dealt with Ficklin. Mr. Garth agreed, as it is termed, to carry these shares for Ficklin—that is, to pay for them as he, Ficklin, purchased them—upon receipt of a sufficient margin to secure the firm against loss. This stock was not listed upon the New York stock exchange, and was
250 not dealt in here, but Ficklin told Garth that he could pick the shares up at Baltimore and other places. The company was a Virginia corporation. Some time after the making of this arrangement several lots of these shares were purchased, doubtless upon the orders of Ficklin, by McKim & Co., brokers, in Baltimore, and, in accordance with Garth's promise to carry these shares, Harrison, Garth & Co. settled McKim & Co.'s account for what they had disbursed in the transaction. The certificates of stock were, of course, sent on from Baltimore by McKim & Co. to the defendants' firm, as their security for the advance thus made to them for Ficklin. The invariable custom under such circumstances is for the seller to deliver the certificates to the broker with a blank assign-

ment and power of attorney (to transfer upon the books of the company) endorsed thereon. Such a thing as placing stock in the name of the firm, when thus acting as brokers, had never once occurred in all its business life. To this Mr. Garth explicitly testified as follows:

"Q. Have you a recollection now of all the various certificates representing stock which came to the firm of Harrison, Garth & Co., bought by that firm? A. Oh, no; there were millions of dollars' worth.

"Q. Am I correct in understanding you to swear deliberately that this is the only instance of all the stock dealt in by Harrison, Garth & Co. in which the certificates were put in the name of the firm Harrison, Garth & Company? A. You distinctly understand me to say that, so far as my recollection is concerned, that was the only instance."

"Q. That is, so far as your recollection is concerned? A. Yes, sir; we dealt in stocks, bonds, and gold as other brokers did, and never had them transferred in our name."

Instead of following this custom and forwarding the ordinary and proper documents, McKim & Co. had the shares transferred upon the books of the company into the name of Harrison, Garth & Co., and it was the certificates naming this firm as the owners of the shares which were sent on to the defendants. This act of
251 McKim & Co. was wholly unwarranted. It was not only contrary to precedent, but, as a matter of fact, was entirely unauthorized. The moment Mr. Garth observed the form of the certificates he repudiated the transfer to his firm and did everything in his power to effect a retransfer. He knew that the stock was assessable and that liability might result from his acceptance of certificates made out in the name of his firm. At the same time he could not prudently return the certificates to the company and demand their cancellation, for the reason that he had advanced his money upon the security of the shares, and he was not called upon to stand upon Ficklin's single responsibility. He did all that he could do under the circumstances to disaffirm the act of McKim & Co. He notified Ficklin and required him to take the stock up and have it transferred from the firm's name. He also returned the certificates to McKim & Co. endorsed in blank, with instructions to sell the shares and have them transferred from the name of the firm. This was, in fact, the only way to get the shares out of the firm's name and at the same time secure their advances. There was no delay or hesitation. The disaffirmance followed at once upon notice of the unauthorized act. Whether or not McKim & Co. obeyed the defendants' orders is immaterial. The unauthorized act proceeded from McKim & Co It was only necessary for the defendants to repudiate that act. They did so in the only practical way which the circumstances permitted. McKim & Co. had transferred the shares to them without right. They at once returned to McKim & Co. the evidence of such unauthorized transfer with the transfer in blank. What more could be done? Nothing that we can see. In our judgment, the retransfer in blank operated in accordance with the defendants' intention, and their

disaffirmance of the unlawful transfer was effectuated thereby. An attempt was made upon the trial to prove that Harrison, Garth & Co. dealt directly with McKim & Co., but the testimony adduced by the plaintiff was quite insufficient to raise a genuine conflict on that head. It is true that the book
252 produced by McKim (and there was but one such book produced) specified Harrison, Garth & Co. as the persons for whose account they made the purchases. But this was entirely consistent with the actual facts as stated by Mr. Garth. If Ficklin had ordered the purchases and directed the stock to be sent to Harrison, Garth & Co. (to be paid for and carried on his account) the entry would properly have been made as it was. Mr. McKim testified that the orders to purchase and sell the shares were given to his firm "verbally either by Mr. Harrison or Mr. Garth." This testimony is for several reasons (entirely consistent with respect to Mr. McKim) quite unreliable. The very fact that he thus speaks in the alternative is conclusive of his inability to recall the particular individual who gave the orders. It will be observed that he speaks of what happened over twenty years ago, and that he failed to produce a letter or paper or book (except the single book to which we have referred) in corroboration of his statement. Then, too, the fact stated was highly improbable. He acknowledged that he knew but little of the defendants' firm. He was asked this question:

"Did you know the firm of Harrison, Garth & Co., of New York, in the year 1866, and had your firm any transactions with them, and what was the nature of those transactions?"

To which he answered as follows:

"I don't think I did. We thought the firm was of Richmond. My remembrance is that they were from Richmond."

He was also asked whether the person who gave the order was thin or stout, to which he answered:

"My remembrance is that he was thin."

It appeared quite clearly that Mr. Harrison did not come within this description, but that Ficklin and Garth did. Now, Garth testified that he never saw any member of the firm of McKim & Co. in his life; that he never knew them and never was in their house; that he never had any personal communication with them, and that Ficklin was in Baltimore at this very time. It is grossly im-
253 probable that a busy New York broker like Mr. Garth should have left his business in this city and gone to Baltimore to give McKim & Co. a verbal order to purchase these shares, and that later he should again have wasted his time on a similar errand, with regard to their sale, when pen, ink, and paper would have answered every purpose. It is highly probable that these orders were given by Ficklin, who was "picking the shares up" in execution of the purpose which he originally disclosed to Mr. Garth, but, whether that inference be legally justifiable or not, certain it is that the orders were not given by Harrison, Garth & Co. It is quite apparent, therefore, that the attempt to exclude Ficklin from these purchases or to make the transaction one of purchase and sale directly as between McKim & Co. and the defendants failed, and

that Mr. Garth's version of the matter stands substantially uncontradicted. We think, too, that after this great lapse of time, and upon the facts as they appear in the record, it is fairly to be inferred that Harrison, Garth & Co. settled with McKim & Co. for the purchase price of the shares before Mr. Garth or any member of his firm was aware of the fact that their names appeared in the certificates as the owners of the stock. There can be no doubt from the entire tenor of Mr. Garth's testimony that had he known of this fact he would never have advanced the purchase price of the shares, but would have refused to honor McKim & Co.'s account therefor, and would have returned the certificates to them at once as contrary to his understanding with Ficklin. There can be but one conclusion of law properly deducible from this state of facts. No person can be made a stockholder without his knowledge or consent (Matter of Reciprocity Bank, 22 N. Y., 9; Keyser *vs.* Hitz, 133 U. S., 138). And, as was said by Earl, J., in McMahon *v.* Macy (51 New York, 161): "There is nothing in any statute which makes the books of the company inconvertible evidence" on that head.

The actual fact may always be inquired into, and if it be shown that the transferee upon the books never consented to accept
254 the shares the transfer to him is simply null and void (Morawetz on Corporations, section 223, and authorities there cited). "It is," as was said in Cartnell's case (9 Ch. App., 694), "of the essence of a transfer that it should be accepted by the transferee." (See also Hennessey's Executors' case, 3 De G. & S., 191, and Chapman and Barker's case, L. R., 3 Eq., 361.)

Nor did the defendants by any neglect or default bring themselves within the rule that a person who permits his name to appear and remain in its outstanding certificates of stock and on its register as a shareholder is estopped as between himself and the creditors of the bank to deny that he is a shareholder (Whitney *vs.* Butler, 118 U. S., 655). That doctrine applies to one who actually is a shareholder, in fact, as well as upon the books of the company, and who transfers his shares to a given person. It is ordinarily his duty to see to it that the latter causes the proper transfer to be made upon the books of the company. But here the defendants were not shareholders in law or in fact, and they made no transfer to any given person. They simply disaffirmed the unauthorized act, whereby their names were inserted in the certificates as shareholders and placed as such upon the books of the company. They had then no means of transferring the shares to any given person. The shares had not been resold when they repudiated the transfer to themselves, and, consequently, there was no person to whom the retransfer could be made when such repudiation took place. What they did do was all that they could do, namely, to return the shares to the Baltimore brokers with instructions to sell them at once and have them transferred from their names; and it appears that when McKim & Co., in obedience to these instructions, resold the shares the books of the corporation were closed, and it was then too late to make the retransfer. Indeed, the company made its assignment the following month, and since then has ceased to be a going corporation. Under these circum-

stances it cannot be said that the defendants have done or omitted to do anything which entitles the plaintiff, as the representa-
255 tive of the company or of creditors, to invoke against them the doctrine of estoppel.

Upon both the facts and the law, therefore, we think that the complaint should have been dismissed. As to the other points which were presented we need only say that we have grave doubts as to the plaintiff's rights to maintain this action, and that in several respects his position with regard to this hard and stale demand fails to commend itself to our sense of equity and justice; but these questions need not be passed upon, as the single consideration already discussed is sufficient to dispose of the entire case.

The exceptions must therefore be sustained and a new trial ordered, with costs, to abide the event.

Van Brunt, P. J., concurs.

256 COURT OF APPEALS,
State of New York, } *ss.:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the twelfth day of April, in the year of our Lord one thousand eight hundred and ninety-two, before the judges of said court.

Witness the Hon. Robert Earl, chief judge, presiding; Gorham Parks, clerk.

Remittitur, April 12th, 1892.

JOHN GLENN, as Trustee, etc., App'l'nt,
ag'st
DAVID J. GARTH and O'rs, Impleaded, etc., Resp'd'ts.

Be it remembered that on the 27th day of October, in the year of our Lord one thousand eight hundred and ninety-one, John Glenn, as trustee, etc., the appellant in this action, came here into the court of appeals, by Burton N. Harrison, his attorney, and filed in the said court a notice of appeal and return thereto from an order of the general term of the supreme court of the State of New York, and David J. Garth and others, the respondents in said action,
257 afterwards appeared in said court of appeals, by William C. Clopton and others, their respective attorneys; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Burton N. Harrison and Mr. John Howard, of counsel for the appellant, and by Mr. Wm. W. MacFarland and Mr. Wm. C. Clopton, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the general term of the supreme court appealed from herein to this court be, and the same is hereby, affirmed and judgment absolute ordered for the defendants, with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed and judgment absolute ordered for the defendants, with costs, as aforesaid.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted unto the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of the State of New York.

258 COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *April 12th*, 1892.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] GORHAM PARKS, *Clerk.*

259 At a special term of the supreme court of the State of New York held at chambers, at the county court-house, in the city of New York, on the 7 day of May, 1892.

Present: Hon. Geo. L. Ingraham, justice.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
ROBERT A. LANCASTER, Impleaded with DAVID J. GARTH and Others, Defendants.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the plaintiff from the judgment of this court at general term to the court of appeals, and that such judgment has been affirmed and is absolute against said plaintiff upon his stipulation given on said appeal to the said court of appeals, and that the record and proceedings had been directed by said court of appeals to be remitted to this court and this court directed to enforce the said judgment of the court of appeals according to law—

Now, on motion of William C. Clopton, attorney for the
260 defendant Garth, it is—

Ordered and adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the defendants and each of them have execution against the plaintiff for the costs when adjusted by the clerk and

inserted in this judgment, and that this order or judgment be annexed to the judgment-roll.

Enter.

G. L. I., *J. S. C.*

Filed May 7, 1892.

261 CITY AND COUNTY OF NEW YORK:

Supreme Court of the State of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,

against

ROBERT A. LANCASTER, DAVID J. GARTH, and SAMUEL J. HARRISON, Impleded with Wellington Goddin, James L. Apperson, and Lewis Ginter, Defendants.

Judgment, May 10th, 1892.

A judgment in this action in favor of the plaintiff against the defendants having been rendered in this court on the 25th day of March, 1890, upon a verdict of a jury directed by the court, with a direction by the court that the exceptions be heard in the first instance at a general term of this court, and the said exceptions having been heard at a general term thereof, and the said general term having sustained the said exceptions and ordered a new trial of this action by order entered June 29th, 1890, and the said plaintiff having appealed from said order of the general term and given a stipulation that said order of the general term be absolute if the court of appeals affirmed such order or judgment against him,

262 and the said court of appeals having sent hither its remittitur filed herein on the 7th day of May, 1892, by which it appears that the said court of appeals has affirmed the said order or judgment of the general term in all things, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court to be enforced according to law, and this court having, by an order entered herein the 7th day of May, 1892, ordered that said judgment be made the judgment of this court—

Now, on motion of William C. Clopton, attorney for the defendant, Garth, it is—

Ordered and adjudged that the judgment of the said court of appeals be, and the same is hereby, made the judgment of this court, and that the defendants and each of them have execution against the plaintiff for the costs as follows: The defendant Garth, for the sum of twelve hundred and forty-four $\frac{5}{100}$ dollars; the defendant Lancaster, for the sum of seven hundred and thirty-nine $\frac{15}{100}$ dollars, and the defendant Harrison, for the sum of four hundred and fifty-nine $\frac{85}{100}$ dollars.

WM. J. McKENNA, *Clerk.*

Filed May 10, 1892, 10 h. 40 min.

263 STATE OF NEW YORK:

In the Court of Appeals.

At a court of appeals for the State of New York held at the town hall, in the village of Saratoga Springs, on the seventh day of June, A. D. 1892.

Present: Hon. Robert Earl, chief judge, presiding.

JOHN GLENN, as Trustee, &c., Appellant,
vs.
DAVID J. GARTH and Others, Respondents.
} Order on Motion for Reargument.

A motion for a reargument of the above cause having been heretofore made upon the part of the plaintiff herein, and papers having been duly submitted thereon and due deliberation thereupon had—

Ordered that the said motion be, and the same hereby is, denied with costs.

A copy.

[SEAL.]

GORHAM PARKS,
Clerk (*Clerk of the Court of Appeals*).

Filed June 22, 1892.

264 At a special term of the supreme court held in and for the first judicial district, at the chambers of the court, in the county court-house, in the city of New York, on the 29th day of June, 1892.

Present: Hon. George P. Andrews, a justice.

Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Impleaded with Others, Defendants.
} Order.

The plaintiff having heretofore moved (1) that the *ex parte* order of this court inadvertently made and dated June 22, 1892, by which the order of the court of appeals denying with costs plaintiff's motion there made for leave to reargue his appeal (from the order of the general term sustaining the exceptions of the said defendants taken on the trial at circuit and setting aside the verdict for plaintiff there rendered) was made the order of this court,

265 be vacated and set aside and resettled and re-entered in such terms as to allow defendants but one bill of costs on the denial of such motion in the court of appeals, and (2) that the costs taxed by the clerk under and pursuant to the terms of said *ex parte* order of this court be retaxed, and (3) for such other or further relief as to the court should seem proper, and said motion having come on to be heard in due course: Now, therefore, upon reading

and filing the order to show cause made by Andrews, J., June 23, 1892, with the affidavit of Burton N. Harrison that day verified and thereto annexed, and reading and returning to the files the said *ex parte* order and the said order of the court of appeals denying the said motion for a reargument of said appeal, and after hearing Burton N. Harrison, Esq., of counsel for the plaintiff, in support of the motion, and hearing also Robert L. Harrison, Esq., of counsel for said defendants, in opposition, and due consideration having been had, it is—

Ordered that said motion be, and hereby is, granted; that said *ex parte* order inadvertently made and dated June 22, 1892, be, and hereby is, vacated and set aside, and be, and hereby is, directed to be resettled and re-entered in such terms as merely to make the said order of the court of appeals the order of this court, and to direct that one bill of costs only be taxed for the successful party on the denial of the plaintiff's said motion in the court of appeals, and so as to include as taxable disbursements for printing in the court
of appeals only the actual disbursements on that account of
266 the counsel who there appeared as counsel for both of the defendants who opposed the plaintiff's said motion for reargument of his said appeal, and that the taxation made by the clerk June 23, 1892, be, and hereby is, vacated and set aside, and the said costs be, and hereby are, directed to be retaxed, as here above directed; and it is—

Further ordered that, pursuant to the directions here above given, the order of the court of appeals denying, with costs, the plaintiff's said motion for leave to reargue his said appeal be, and hereby is, made the order of this court, and the said motion costs of said defendants are hereby directed to be taxed by the clerk at twelve $\frac{70}{100}$ dollars, being but one bill of costs only to be paid by the plaintiff to said defendants.

Filed June 29, 1892.

Enter.

G. P. A.,
J. S. C.

267 STATE OF NEW YORK:

COURT OF APPEALS, CLERK'S OFFICE.

I, Gorham Parks, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of John Glenn, trustee, appellant, *vs.* David J. Garth, &c., respondents, with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

Seal State of New York, Court of Appeals.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 27th day of August, A. D. 1892.

W. H. SHANKLAND,
Deputy Clerk.

268 Court of Appeals.

JNO. GLENN, Trustee, Appellant,
vs.
DAVID J. GARTH, &c., Respondents.

APRIL 12TH, 1892.

Burton N. Harrison and John Howard, for appellant; W. W. MacFarland and Wm. C. Clopton, for respondents.

FINCH, *J.*:

This action rests upon contract. Its foundation is an express agreement between the corporation on the one side and the defendants on the other. It depends upon a created and existing contract relation, from which and from which alone can spring the liability alleged. (McMahon *vs.* Maly, 51 N. Y., 155; Matter of Reciprocity Bank, 22 N. Y., 9; Keyser *vs.* Hitz, 133 U. S., 138). To establish that relation it must appear that the minds of the parties met; that the defendants agreed to be and become stockholders in the corporation, with the privileges and responsibilities of that relation, and that the corporation accepted them as such. The former could not be put in that position against their will without their consent by the unauthorized and unratified act of a third person, for in such case there would exist no contract relation, no mutuality of agreement, but simply a mistake or a wrong which the defendants might ratify and condone or repudiate and reject. The
269 judgment of the general term which reversed that rendered by the trial court in favor of the plaintiff rests upon this doctrine, and holds that the defendants never took upon themselves the contract relation of stockholders in the Virginia corporation, and we are to determine whether that fact appears without either proof or admissible inference to the contrary, since the reversal was for error of law and founded upon exceptions.

The facts established were the following: The corporation was created under the laws of the State of Virginia, with a capital stock fixed at five millions of dollars, of which but twenty per cent. had been actually paid in. The remaining eighty per cent. was payable by the stockholders whenever called for by the company, and upon such call became a debt and due in accordance with the terms of the lawful demand. That corporation supplanted and superseded a prior organization of similar plan and purpose, but with a much smaller capital stock, and among the corporators of the earlier company was one Ficklin, who may be supposed to have known and understood the financial condition and prospects of each company. He desired to purchase some of the stock of the new corporation, but, lacking the necessary funds, applied to the defendants to buy it and carry it for him. The latter were bankers and brokers, in the daily habit of carrying stocks upon a margin, and conducting such business in one uniform and customary manner. Buying for others and not for investment, they never caused the stock purchased
270 to be transferred to themselves upon the corporate books and never intended to be and never became stockholders in

the companies whose securities or certificates they handled. What they bought or held as collateral was always the certificate of some stockholder, assigned in blank, and which might pass through many hands before a transfer on the books of the companies. By this process they bought and held the right to become stockholders, the potential authority and opportunity to assume that relation, but were equally at liberty not to do so; at least in all cases where the corporate law recognized no transfer except upon the corporate books. Before such transfer the defendants were in one sense holders of stock, but not, in their relation to the corporations, stockholders. To these brokers doing business in this manner Ficklin applied to buy for him the stock of the transportation company and carry it for him upon a margin, and they assented, knowing the stock to be assessable and not listed, and both parties contemplating an ownership by the customer and a lien or hypothecation as the interest of the broker. Whatever purchase was made by the latter was meant to be as agent for the customer and not as owner. It was at Ficklin's suggestion that the stock was picked up in Baltimore and most of it through the agency of McKim. Who directed him to buy is not entirely certain. The strong probabilities are that it was Ficklin, but whoever it was the order given was to buy the stock for the account of the defendants and send the certificates and bill to them. There is no pretense that any direction or authority was given by anybody to McKim to cause the stock to be transferred upon
271 the books of the company. Whether the order was given by one of the defendants or by Ficklin, it did not extend to such a transfer and could not have done so without violating the actual contract made and the proved intention of the parties.

But at this point McKim made a mistake, without which the present litigation would have been impossible, and upon which the whole claim of the plaintiff rests. He caused the stock purchased to be transferred to the defendants upon the books of the company. He did so honestly enough, but without authority or direction and solely by reason of his ignorance of the actual facts and his misinterpretation of the purpose of the parties. His act did not make the defendants stockholders. He was not empowered to make any such contract or establish any such relation, and could not impose it upon them by an act which was in no sense theirs. The defendants could only become responsible for it by estoppel or ratification. There never was any basis for an equitable estoppel. Neither the company nor any of its creditors did anything or forbore anything upon the faith or because of the appearance of ownership in the defendants. The case is bare of any such proof. The question raised, however, is one of ratification, and grows out of the subsequent action of the defendants. When the certificate reached them they discovered McKim's mistake. Garth wrote to him repudiating the transfer and denying his authority to make it and directing him as a means of undoing the mischief to sell and transfer the whole
272 four hundred and ninety shares. To enable him to do so in accordance with established forms the defendants signed and executed an assignment in blank of the stock transferable by deliv-

ery and McKim sold it, but it was not transferred upon the corporate books. Before that could have been done—or, at all events, before it was done—the corporation failed and made a general assignment to trustees for the benefit of creditors, and, no transfer on the books having been accomplished, the defendants are sought to be charged as stockholders with the whole eighty per cent. remaining unpaid upon the stock subscriptions. The question, therefore, culminates in the legal effect of the conduct of the defendants and becomes an inquiry whether their act, intended as a repudiation, meant to undo what had been done and so declared and described at the time, must, nevertheless, because of its form be deemed evidence of an assent never in truth given. In considering that question we may proceed upon the actual facts and unhampered by any equities founded upon their false appearance, since none such existed.

It is first said that the defendants paid McKim for the stock after they had received the certificates and with full knowledge of their form. I think the evidence makes reasonably possible such an inference, and so accept it as a fact, but such payment it was the duty of the defendants to make and the right of McKim to require, notwithstanding the mistake made. His fault was not in buying the stock; he was authorized to do that, and the defendants were bound to reimburse him. The mistaken form of the certifi-
273 cates justified a demand for correction, but not a refusal to pay as between defendants and McKim, and such a correction would be consistent with the purchase by the agent and the payment by the principal. That payment was a confirmation of the authorized purchase, but not a ratification of the unauthorized act which followed it. That was repudiated at the very time of the payment and consistently with it both to McKim, the broker, and Ficklin, the general owner.

But greater reliance is placed upon the action which followed. As has been explained, the defendants, instead of returning the certificates to McKim with a demand that their form be changed, assigned them in blank and required him to sell them. Unexplained, the act recognized an ownership and the existing transfer to the defendants and was imprudent exactly for that reason. Why they did so we can easily see. They must have realized that McKim might be unable to procure a cancellation of the transfer on the books, or meet with delay and possibly litigation in the effort, and that if the certificates were delivered to Ficklin to be registered in his name and then be assigned by him in blank to defendants they would be left without security in the interim. Both methods of procedure, although acts of disaffirmance and repudiation, would require an assignment by the defendants of the formal record title in them. The company would naturally require it for their safety and to preserve the regularity of their books if a cancellation were sought, and it would be equally necessary in order to put title in Ficklin. In carrying out those meth-
274 ods of correction and disaffirmance the formal assignment of the formal title instead of proving ownership would

be an element in the disclaimer of ownership. The method of an immediate sale involved in the same way a transfer of the same formal legal title and when done, not as a confirmation of ownership, but as a method of changing the registry of the company with a view of correcting the false appearance of ownership I can see no reason for deeming it a confirmation or ratification, for what is a ratification where no rights of third persons are involved? It implies a conscious and intended approval of the act done. It rests upon the actual and existing purpose to make such approval. Hence the courts say that it must occur with full knowledge of all the facts. It rests in the intention, where the question is between the original parties, and depends upon the fact and not upon appearances. In this case we know that the intention was to disaffirm and repudiate the apparent contract relation seemingly established by the mistaken action of McKim, and that the assignment in blank for purposes of sale was not meant to affirm the apparent ownership, but to transfer the formal legal title put in the defendants against their will. The facts show without contradiction that the defendants never entered into the contract relation with the corporation of stockholders therein, but, on the contrary, refused to be put in that position and acted with a view to undo and alter the appearances in such direction which occurred without their consent. As between
275 the original parties that could not be deemed a ratification which was accompanied by a refusal to ratify and a declared purpose to undo the unauthorized act. The form adopted by itself unexplained would tend to an inference of ratification, but it is not left unexplained. The actual truth is established, and that truth must prevail over the form adopted as between parties who have not been misled to their harm by the form of the transaction as distinguished from its substance.

But it is further claimed that under the statutes of Virginia as expounded by their courts the transfer upon the books of the company is conclusive upon the defendants and makes them stockholders, at least as to creditors, irrespective of the circumstances of the registry. It is obvious that any enactment which enabled a wrongdoer to load upon a stranger the heavy responsibilities of a stockholder without his knowledge or assent would be an outrage upon the rights of the individual not to be expected. The statutes of Virginia accomplish no such wrong, but operate reasonably within certain well-defined limits. We are referred to the Code of 1860, chapter 57, and section 7. That regulates the rights of the assignor of stock appearing as owner upon the corporate books relatively to his assignee, who does not so appear, and to the creditors of and subsequent purchasers from the former and vests the title in the assignee; not, let it be observed, for all purposes, but "so far as may be necessary to effect the purpose of the sale, pledge, or other
276 disposition" and subject to the provisions of the 25th section. That is in these words: "A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as regards the company." The plain meaning is that the corporation which has acknowledged the ownership and accepted

its evidence and admitted it upon its records shall not be at liberty to dispute it. Its meaning is not that it shall be conclusive against the alleged stockholder. Indeed, in Vanderwerker *vs.* Glenn (85 Va., 9) the court state the rule to be that the record upon the corporate books is *prima facie* evidence of the ownership, and after examining all the cases referred to I find none which venture any further. In Magruder *vs.* Colston (64 Maryland, 350) the pledgee of stock had himself caused it to be registered in his own name as owner and became a stockholder by his conscious and voluntary act and assent as respected the company and its creditors, and in McKim *vs.* Glenn (66 Maryland, 482) reliance was put upon the transfer on the books largely upon the ground that there was no foundation for saying that the transfer was made without authority.

If in some of the cases there were expressions indicating an approach to the idea of an equitable estoppel upon the ground that creditors might be presumed to have trusted the company upon the faith of the apparent ownership they did not in the end rest upon it, because in every instance the transfer on the books was shown to be the defendant's conscious, voluntary, and intended act and
277 not the representation of a falsehood. Here the trustee who sues represents the corporation and the whole body of its creditors. I cannot find even that any creditor became such after the transfer by McKim or with knowledge of the names of the stockholders, or that anybody up to the moment of the failure and of the trust deed which fixed all the creditors' rights did anything or forbore anything upon the faith of an ownership of stock by the defendants. We may stand, therefore, as did the general term upon the truth of the transaction as proved and established. The presumption which might have flowed from the form of the transaction disappears upon the explanation made and in view of the substantial truth proved by the evidence.

The order should be affirmed with costs and with judgment absolute against the plaintiff upon the stipulation.

"All concur."

A copy.

H. E. SICKLES, *Reporter*,
Per C.

[Endorsed:] Filed Sept. 8, 1892.

278 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, Gorham Parks, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of John Glenn, appellant, *vs.* David J. Garth *et al.*, respondents, with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

Seal Court of Appeals, State of New York.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 27th day of August, A. D. 1892.

W. H. SHANKLAND,
Deputy Clerk.

279 Court of Appeals.

JUNE 7TH, 1892.

JNO. GLENN, Appellant,
vs.
DAVID J. GARTH *et al.*, Respondents.

John Howard and Burton N. Harrison, for motion; W. W. MacFarland and Wm. C. Clopton, opposed.

Motion for reargument.

FINCH, *J.:*

This is a motion for a reargument, made long after the entry of judgment on the remittitur and when we have lost jurisdiction of the case, suggesting no point overlooked, citing no new and pertinent authority, but stoutly and vigorously insisting that the court has gone astray, and that its decision is unsound. We are expected to ask for a return of the remittitur and seek in that manner to retrace our steps and correct an error alleged to be dangerous. Ordinarily no more than this would need to be said to justify a denial of the motion, but the case itself is both important and peculiar and the conviction of the unsuccessful counsel is so sincere and profound that we feel willing to venture a new attempt to locate correctly the mistake which one or the other of us has made.

It is insisted that we have violated the rule that one who authorizes and permits a transfer to himself of shares of stock upon
280 the books of a corporation must be held to be a stockholder, whether in truth the real owner or not, when the rights of corporate creditors are involved, and is equitably estopped from denying the apparent relation. I admit the rule and have nowhere doubted or denied it, although I am unwilling to agree that it logically rests upon or amounts to an equitable estoppel in a case where no creditor relied upon or even knew of or could have been deceived by the false appearance, but waiving that criticism for present purposes, and assenting to the rule as presenting a possible case of equitable estoppel, we still say, as was declared in the opinion, that there is no question of estoppel in the controversy. That question is not reached, because before it can be reached there must be shown to exist some act of the party, done by him or with his assent, creating the alleged apparent relation; that fact must be established before any question of estoppel can arise; if the act done, the false appearance created, is the act, not of the party, but of some third person, such party is in no manner bound or affected by it unless he either originally authorized it or subsequently rati-

fied it. Only by the one process or the other can it become his act and until he can be held responsible for it there can be no question of estoppel, and there is not a case cited on the original argument or on the brief now presented, in which the rule of estoppel was applied, which failed to show that necessary and conscious and voluntary act of the party estopped.

Now, what we decided in this case and all that we decided
281 was that there was no such act on the part of the defendants, and how the determination of that effect of the evidence can shake the foundations of the commercial law does not readily suggest itself to our minds. The pith of the controversy lies at this point alone. The defendants did not originally authorize the transfer of the shares to them upon the books of the company. There was no dispute in the evidence about that. The act was done without their antecedent knowledge or authority. They never so intended, their whole course of business was to the contrary, and the very contract which induced the purchase involved an ownership other than their own. They did direct the purchase of the stock in pursuance of their contract with Ficklin to carry it for him on a margin, and it is now broadly intimated that such direction carried with it an implied authority in the vendors or assignors to make a transfer upon the books of the company. There at least is a doctrine upon which commercial interests, if not the commercial law, may look with some degree of terror. The authority for it to which we are referred is Webster *vs.* Upton (91 U. S., 71). That appears to have been a case of the direct purchase of shares from a stockholder of record by one desiring and intending to become himself the owner. In such a case, where the purchase might be reasonably deemed one for investment, it may be, as the court declared, that there is implied authority in the vendor to make the transfer on the books of the company, but no such implication can attend the dealing of broker with broker. Each
282 known that the other is merely a middleman or agent for third persons, for that is their customary and constant attitude. The broker buying neither known nor cares who the real seller will prove to be, and the broker selling neither known or cares who is to be the real buyer. Each understands that the other is only the intermediate channel or agency of transfer, and an absolute ownership on either side would seldom be suspected. To say of such a case that the broker selling is authorized by implication to treat the broker buying not merely in some but in all respects as the ultimate owner by making a transfer to him on the corporate books instead of sending certificates assigned in blank after the customary method would be to introduce into the brokers' business an element of incalculable danger. It would be ruinous to the stock exchanges and perilous to their dealers. Who would loan money upon stock collateral or carry stocks for customers upon a margin if the broker vendor could at once on a mere order to buy make the broker vendee a stockholder and load upon him ruinous responsibilities? If the latter is so at the mercy of the former there might be purchases for investment, but none, except at enormous peril, for that

vast volume of transactions which proceed without and do not contemplate such transfers. The whole course of the brokers' business, as disclosed by the evidence, forbids the existence of any such implied authority. The defendants, therefore, were put upon the books of the company as shareholders without their knowledge, au-
283 thority, or consent and contrary to their purpose and intention. The act was not theirs and could only become theirs by a subsequent ratification, and hence it was that we said before, and now repeat, that the question involved is not one of estoppel, but solely and only one of ratification.

Proceeding to that inquiry, we held that there was no such ratification. We need not here repeat the argument. We did not then and do not now underrate the difficulty which grew out of the imprudent mode of redress which the defendants adopted. Its form furnished ground for some technical reasoning quite plausible and not without elements of strength. We sought to take fairly its full measure and weight. The act done was an act of repudiation. The unauthorized certificates were returned at once to the agent who violated his duty with a refusal to accept the situation. Similar notice was sent to Ficklin; but the defendants knew that the formal legal title had been put in them and could not easily be got out of them without their own formal assignment, and that they attached as a mode of enabling McKim to undo the mistake as they had demanded that he should. It is upon that act and that alone that the whole case of the plaintiff rests. An act intended for a repudiation is claimed to be conclusively one of ratification. We gave the reasons why we thought the substance of the transaction should prevail over its form, and the real truth over the false appearance, and that view, we think, is justified even as against creditors when we take into consideration the real equities of the situation.
284 No creditor in the present case has been at all misled by the wrongful entry of defendants' name on the books of the company. Not one is shown to have seen that entry or heard of it, to have changed his position in the least degree on account of it, or to have been misled to his injury by it to the value of a single farthing. No servant of the company worked an hour in reliance upon that registry, and no railroad carried a pound of freight more because of it. Every debt contracted would have been contracted had the wrong entry never appeared upon the books. To manufacture an equity out of such material to shut out the truth is little short of nonsense. If we can speak of such a situation as constituting an estoppel at all, it must be on the ground of a presumed or constructive reliance by the creditors upon the existence of a body of stockholders generally liable to make up the capital and not upon the presence among them of some particular individual. But if the defendants did not become stockholders their assignors remained such and some of them have already had to pay, and the real right of the creditors is outside of the question between the disputants, and is in no sense invaded by a fair and just determination of that question. It is impossible to discover what equity they have to insist that one who did not consent to the entry should be

substituted for one who did, or to fasten upon the former the liability of the latter. The creditors may, indeed, justly insist that one who has permitted himself to be registered as a stockholder and taken the benefit of that act shall not
285 be allowed to escape its burdens, for that is the rule which I have steadily admitted and which the Federal court in the case cited puts not upon the ground of an estoppel, but upon the theory that the capital or the liability for it is a trust fund which neither the company nor its members can divert from the security of its creditors; but the latter have no shadow of an equity to insist that one whose name was put upon the roll without his consent and against his will shall not prove the truth until they show that they trusted to that very false appearance and were misled by it, and that the apparent shareholder was in some manner responsible for it. In this case the creditors have no such equity to prevent the exact truth of the transaction from being proved and having its due effect.

I think we may reach the same result from another direction. In Seymour *vs.* Sturgess (26 N. Y., 134) we held that the liability of a shareholder to the company for calls made on account of unpaid stock could only be enforced by an action in the nature of assumpsit, and necessarily rested upon a promise to pay, express or implied; that such promise must be proved by competent evidence, and equally whether the rights of creditors were involved or not. Indeed it was explicitly declared, which is the point I have been seeking to elucidate, that such creditors claiming through the company have no greater right than belongs to it. Now, in this case no express promise to pay the calls was made or is pretended. The plaintiff's action necessarily rests upon some implied
286 promise. But what is an implied promise? It is a fiction which the law raises to express the equity of a situation. It is the law's judgment of what on the facts is just and right between the parties. It is a promise which, though not made, ought to have been made. Where the shareholder consciously accepts that relation he ought to bear its burdens as well as enjoy its benefits, and it is easy to imply a promise to perform that duty. But where he does not accept the relation; where it was put upon him by another without authority and against his will; where instead of accepting its benefits he repudiated them at serious loss; where his mind and that of the company never met in any contractural relation; where it was not his duty to pay and he explicitly refused to take what was offered, all foundation for an implied promise is gone. The facts do not admit of it, for the law does not raise a fiction to accomplish a wrong; and thus again we come to the proposition that the real truth must be ascertained, and when ascertained must control, and that real truth is that the defendants repudiated and did not ratify the unauthorized act of McKim. The whole force of a ratification lies in conscious and intended assent with full knowledge of the facts. If there is no such intent and no such volition, but a contrary intent and an opposite purpose, there is no ratification.

The absence of any such intent and the presence of a different one is clearly disclosed by the facts.

Of course, the question discussed is vital to the contro-
287 versy. Under the law both of this State and of Virginia one may be, as we said in the former opinion, a holder of stock without being in the full sense of the term a stockholder. Our statute of 1848 as to manufacturing corporations (chap. 140, sec. 16) and that of 1850 as to railroads recognized that a person may hold shares as collateral without being liable to assessment, and it rests upon the obvious ground that the pledgor in whose name the stock is registered remains the general owner notwithstanding the pledge, and the company cannot treat him otherwise nor practically claim that both pledgor and pledgee are at the same time stockholders of the same stock. The pledgor remains liable; the pledgee never becomes so. The statute of Virginia (Code of 1860, ch. 57, sec. 25) makes those and only those stockholders "as it respects the company" whose names are registered on its books as such, and that enactment, thus requiring an acceptance and recognition of the stockholder by the corporation, shows that it is a contract relation which is contemplated and involves an actual assent on both sides. The seeming intimation ventured on behalf of the appellant that the effect of that act is to make one conclusively a stockholder whose name was registered, whether he knew and assented or not, is too plainly unendurable to require serious discussion. No one can be made a stockholder without his consent, express or implied; and so there is no view of the subject which can dispense with proof of that assent by the defendants as a vital and necessary element of the plaintiff's case.

We have said that there is no proof of such assent. The
288 appellant's counsel, however, insist that there is some proof of it, and enough to raise a controverted question of fact upon which the verdict directed by the court is as conclusive upon us as would be the verdict of a jury. That we are quite sure is a mistake. We discover no such proof. To find any it would be necessary to separate some single fact from its surroundings and pervert the just inference to be drawn from it. Neither party asked to go to the jury. Both assumed that the material facts were undisputed. The defendants upon them raised a question of law by a motion for a nonsuit, which was denied and an exception taken. Judgment was suspended and the exceptions ordered to be heard at the general term. The plaintiff was required to go there for his judgment and get it by defeating the exceptions. He made the case himself with that notice and peril before him, and it is not to be presumed that he omitted anything essential. The judgment of the general term determined that assent to the stockholder's relation was necessary to be proved, but that there was no evidence to prove it, but on the contrary proof of express dissent. In that view we concurred and decided not a question of fact but one of law.

Much more might be said as a commentary upon the plaintiff's brief, but the cause of action sued upon is already about a quarter

of a century old, and will grow still more venerable if we do not somewhere end the discussion.

The motion should be denied with costs.

"All concur."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

289 In the Supreme Court of the United States.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff in Error,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Defendants in Error.
} Assignment of Error.

Afterwards, to wit, on the 23d day of September, in the year 1892, at the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, by Burton N. Harrison, Esquire, his attorney and counsel, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

That the action in the supreme court of the State of New York was commenced and prosecuted by this plaintiff in error, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, a corporation of the State of Virginia, under and by authority of judicial proceedings of the State of Virginia, to enforce against these defendants in error, as de-
290 fendants in the action, a liability under said judicial proceedings of the State of Virginia and as fixed and prescribed by public acts (laws) of the State of Virginia; that said judicial proceedings and said liability under said public acts of the State of Virginia were specially alleged in the complaint in the action and were duly proved in evidence on the trial, where, and always throughout the action, this plaintiff in error specially set forth and claimed the right to judgment and recovery in the supreme court of the State of New York against these defendants in error under the provision of the Constitution of the United States that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," but that said claim of said right under the Constitution of the United States was denied by the judgment of the supreme court of the State of New York now brought to be re-examined and reversed by the Supreme Court of the United States upon writ of error.

And that the particulars of said assignment of error are more fully set forth as follows:

That, as appears by the record, the complaint of the plaintiff, in paragraphs designated first, second, third, fourth, fifth, sixth, and

seventh (and elsewhere in said complaint), specially alleged that the National Express and Transportation Company was and is a corporation of the State of Virginia, incorporated, organized, and existing under the laws of said State of Virginia, which said laws
291 (being public acts of said State) fixed the obligations and liabilities of the stockholders and members of said company; and, further, specially alleged that the defendants were copartners, carrying on business under the firm name of Harrison, Garth & Co., and as such became the assignees, transferees, and holders of certain 490 shares of the capital stock of said corporation, of the par value $100 each, and became and were received and accepted by the company as stockholders and members of the corporation under the laws of the State of Virginia, with all the liabilities by said laws prescribed, including the liability for and obligation to pay to said company or to its assigns in installments, and as and when the defendants should lawfully from time to time be called upon and required to pay the same, so much of the par value of each of the shares so held by them as had not been theretofore paid on said shares at the time when the same were assigned to and became the property of the defendants; and, further specifically alleged that it was by and according to the tenor and effect of said public acts of the State of Virginia and said assignment and transfer and acceptance that the defendants became and were received and admitted to be stockholders in and members of said company and promised, undertook, and agreed to sue and be sued, implead and be impleaded, contract and be contracted with in the name of said corporation as to any and all matters touching or affecting the property, rights, or obligations of the company and as to the rights, duties, and liabilities of defendants as stockholders in or members of
292 said corporation; and, further, specially alleged that at the time the said shares were so assigned and transferred to the defendants there remained unpaid the full sum of eighty dollars per share which had not been theretofore required to be paid to the corporation or otherwise, which said sum of eighty dollars per share the defendants became and were bound to pay in such installments and as and when the same should be lawfully required to be paid under and by virtue of said public acts of the State of Virginia; and, further, specially alleged that on or about September 20, 1866, said company duly made an assignment by deed of trust to three trustees therein named for the benefit of creditors of the company, which said deed of trust and assignment were assented to by the defendants, who became bound thereby, and have been construed and enforced by courts of the State of Virginia of competent jurisdiction in the premises in a suit duly brought and there pending, in which a creditor of the company, suing in his own behalf and in behalf of all other creditors, was plaintiff and the company itself and all other necessary parties were defendants, by judicial proceedings which resulted in calls by decrees of said courts for payment by the stockholders of, in the aggregate, eighty per centum of the par value of their shares, the removal by decree of the trustees in the deed named, the appointment of the plaintiff to be substi-

tuted trustee in their place and stead, with directions to the plaintiff to collect from all stockholders the amounts so called for and required to be paid; and, further, specially alleged demand
293 duly made upon the defendants for the amounts so required to be paid by them as stockholders and their refusal to pay; and, further, specially alleged a demand by plaintiff as such trustee for judgment for the sums so due by defendants as such stockholders.

That, as appears from the record, on the trial all the allegations of the complaint were proved in evidence; the said judicial proceedings of the State of Virginia and said public acts of said State were specially proved, including the provisions of one of said public acts that "a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as it regards the company," and it was also specially proved that the said 490 shares of stock stood (and 390 of them still stand) on the books of the National Express and Transportation Company in the said firm name of defendants; that the said shares were, by the admissions of the answers of defendants, caused to be purchased in May, 1866. The stock certificates representing said shares at the time of such purchase were transferred of record on the books of the company to defendants, to whom new certificates in their said firm name were issued by the company. The defendants paid for the shares and received and accepted and for a time held the said certificates so made out in their firm name. They afterwards sold the said shares to other persons, to whom they gave formal assignments in writing, subscribed by defendants in their said firm name, authorizing the purchasers to transfer the shares, and defendants received and to their own use appropriated the cash proceeds of such sales, and there was also specially proved in evidence on the trial the provision of the public acts of said State of Virginia that, on any assignment of shares of stock of a corporation of that State, the assignee and assignor shall each be liable for any instalments of money which may have accrued or may thereafter accrue and become payable upon or for or on account of such shares so assigned, and may be proceeded against for the collection of such instalments.

That, as appears by the record, the plaintiff, in the allega-
294 tions of his said complaint and in the evidence given on the trial and always throughout the proceedings, made a case which necessarily comes within the provision here below quoted from the Constitution of the United States, and specially set forth and claimed the right, title, and privilege or immunity, under the Constitution of the United States, which is secured by the provision of section 1 of article IV of the Constitution, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

That, regardful of said claim and of said allegations of the complaint and of said evidence at the trial, the learned judge who there presided directed the verdict which was rendered for the plaintiff and against the three defendants in error for $30,641.50, though he allowed the exceptions of said defendants to be heard in the first in-

stance at the general term of the court and suspended judgment meantime; but that, on the hearing of the said exceptions at the general term, the judges there sitting disregarded the said allegations of the complaint and the said evidence at the trial, and so misconstrued the said public acts and the said judicial proceedings of the State of Virginia as effectually to destroy their meaning and intent, and thereby denied the claim so made by the plaintiff in error to said right under the Constitution of the United States, which said misconstruction of the said public acts and judicial proceedings of the State of Virginia were persisted in and enforced by the
295 court of appeals of the State of New York, as appears by the opinion there handed down and by the order there made, directing the supreme court of the State of New York, by remittitur sent down by and from said the court of appeals, to enter judgment against this plaintiff in error and in favor of these defendants in error, dismissing the complaint with costs, which said judgment was so entered by the supreme court of the State of New York May 10, 1892, and proceeds, as appears from the record and especially from the opinions handed down at said the general term and said the court of appeals, upon the ground that (the evidence in the record to the contrary notwithstanding and the claim so made to said right under the Constitution of the United States notwithstanding) the defendants in error were not and are not to be treated by the courts of the State of New York as stockholders of or in the said The National Express and Transportation Company and were not and are not liable as such in the supreme court of the State of New York to this plaintiff in error in the action there commenced and prosecuted by this plaintiff in error against said defendants.

Wherefore the said John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, prays that the said judgment of said the supreme court of the State of New York, entered May 10, 1892, upon the remittitur from the court of appeals of the State of New York in favor of these defendants in error and against this plaintiff in error, the effect of which is to dismiss the complaint with costs, be reversed, and that judgment be directed by the Supreme Court of the United
296 States in favor of this plaintiff in error and against these defendants in error upon the said verdict for $30,641.50, with interest from March 25, 1890, at the rate of six per centum per annum, besides the said plaintiff's costs of the action, including his costs in the Supreme Court of the United States, and that this plaintiff in error have execution therefor against these defendants in error and for such further or for such other relief as may be just.

BURTON N. HARRISON,
Attorney and of Counsel for Plaintiff in Error,
120 *Broadway, New York, New York.*

297 [Endorsed:] Supreme Court of the United States. John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, plaintiff in error,

against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, defendants in error. Assignment of error. Filed Aug. 26, 1892, — hr. — min. Burton N. Harrison, counsel for plaintiff in error, 120 Broadway, New York.

298 In the Supreme Court of the United States.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff in Error,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Defendants in Error. } Bond.

Know all men by these presents that we, The American Surety Company of New York, a corporation of said State of New York, having an office and principal place of business at No. 160 Broadway, in the city of New York, pursuant to the statute in such case made and provided, are held and firmly bound unto David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, their certain attorneys, administrators, or assigns, in the sum of seven thousand dollars ($7,000), lawful money of the United States; to which payment, well and truly to be made, we bind ourselves and our successors firmly by these presents.

Sealed with our corporate seal and dated this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the supreme court of the State of New York, in the first judicial district, in an action pending in the said court between the said John Glenn (as trustee of and for the benefit of the creditors of the National Express and Trans-
299 portation Company, a corporation of the State of Virginia), as plaintiff, and the said David J. Garth, Robert A. Lancaster, and Samuel J. Harrison (therein impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter), as defendants, judgment was rendered that the judgment of the court of appeals of the State of New York (whereby the order of the general term that the exceptions taken by the said defendants at the trial at the circuit be and were sustained and the verdict which had been at said circuit directed and rendered in favor of the said plaintiff and against the said defendants be and was vacated and set aside was affirmed and judgment absolute in favor of said defendants and against the plaintiff, with costs, was directed) be, and the same thereby was, made the judgment of said the supreme court of the State of New York, and directing, further, that the said three defendants have execution against the plaintiff for costs, aggregating two thousand four hundred and forty-three $\frac{5}{100}$ dollars, and the said John Glenn, the plaintiff aforesaid, having procured to be allowed and issued a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued directed to the said David J. Garth, Robert A. Lancaster, and Samuel J. Harrison,

citing and admonishing them to be and appear at the Supreme Court of the United States as and when in said citation is recited and required:

Now, the condition of the above obligation is such that if the said John Glenn, as trustee as aforesaid, the plaintiff afore-
300 said and plaintiff in error in said the Supreme Court of the United States, shall prosecute his writ of error to effect, and if he fail to make his plea good shall answer all damages and costs, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof we, the said The American Surety Company of New York, have caused our corporate seal to be hereto affixed and our corporate name to be hereto signed, at the city of New York, New York, the said 24th day of August, 1892.

AMERICAN SURETY COMPANY
OF NEW YORK,
By DAVID B. SICKELS, *2d Vice-President.*
[SEAL.] WM. E. KEYES, *Secretary.*

At a meeting of the board of directors of the American Surety Company held at the office of the company on the 9th day of June 1886, on motion, it was—

"Resolved, That, in pursuance of chapter 416, Laws of 1886, amending section eight hundred and eleven of the Code of Civil Procedure, the president or vice-president be, and either of them is, hereby authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company and to attach thereto the seal of the company, the same to be attested by the secretary or assistant secretary."

301 UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*
City and County of New York,

I, Wm. E. Keyes, secretary of the American Surety Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my *ha*nd and the seal of the company, at
[SEAL.] the city of New York, this twenty-fourth day of August, 1892.

WM. E. KEYES, *Secretary.*

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*
City and County of New York,

On this twenty-fourth day of August, 1892, before me personally appeared David B. Sickels, 2d vice-president of the American Surety Company, with whom I am personally acquainted, who, being
302 by me duly sworn, said that he resided in the city of New York; that he is the 2d vice-president of the American Surety Com-

pany of New York; that he knew the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2d vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 486, of the Session Laws of 1881; and the said David B. Sickels further said that he was acquainted with Wm. E. Keyes and knew him to be the secretary of said company; that the signature of the said Wm. E. Keyes, subscribed to the said instrument, is in the genuine handwriting of the said Wm. E. Keyes, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said David B. Sickels, 2d vice-president.

[SEAL.] GEO. L. HOLMES,
Notary Public, No. 144, New York County.

Certificate filed in Kings Co.

303 [Endorsed:] Supreme Court of the United States. John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, plaintiff in error, against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, defendants in error. Copy. Security taken by the judge signing the citation. Original filed Aug. 26, '92. This copy filed Sept. 8, 1892. Burton N. Harrison, counsel for plaintiff in error, 120 Broadway, New York. Approved August 24, 1892. Edw'd Patterson, justice supreme court.

304 Supreme Court, City and County of New York.

JOHN GLENN, as Trustee of and for the Benefit of the Creditors of the National Express and Transportation Company, Plaintiff,
against
DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON, Impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter, Defendants. } Petition.

To the presiding justice of the supreme court of the State of New York, first judicial district:

The petition of John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, respectfully shows:

First. That heretofore and on or about the 10th day of May, 1892, a judgment was entered (upon and by direction of an order of said the supreme court of the State of New York, made and entered May 7, 1892, by the court, at special term, in the first judicial district, upon the remittitur from the court of appeals that day filed), in the office of the clerk of said the supreme court, in the county court-house in the city of New York, in the action here above entitled

(upon the *ex parte* motion of the attorneys for said defendants), in favor of said David J. Garth, Robert A. Lancaster,
305 and Samuel J. Harrison, defendants above named, and against your petitioner, plaintiff above named, in terms as follows:

"*Judgment, May 10th*, 1892.

"A judgment in this action in favor of the plaintiff against the defendants having been rendered in this court on the 25th day of March, 1890, upon a verdict of a jury directed by the court, with a direction by the court that the exceptions be heard in the first instance at a general term of this court, and the said exceptions having been heard at a general term thereof, and the said general term having sustained the said exceptions and ordered a new trial of this action by order entered June 29th, 1890, and the said plaintiff having appealed from said order of the general term and given a stipulation that said order of the general term be absolute if the court of appeals affirmed such order or judgment against him, and the said court of appeals having sent hither its remittitur filed herein on the 7th day of May, 1892, by which it appears that the said court of appeals has affirmed the said order or judgment of the general term in all things, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court to be enforced according to law, and this court having, by an order entered herein the 7th day of May, 1892, ordered that said judgment be made the judgment of this court:

"Now, on motion of William C. Clopton, attorney for the defendant Garth, it is—

"Ordered and adjudged that the judgment of the said
306 court of appeals be, and hereby is, made the judgment of this court, and that the defendants and each of them have execution against the plaintiff for the costs as follows: The defendant Garth for the sum of twelve hundred and forty $_{100}^{5}$ dollars, the defendant Lancaster for the sum of seven hundred and thirty-nine $_{100}^{15}$ dollars, and the defendant Harrison for the sum of four hundred and fifty-nine $_{100}^{85}$ dollars."

And that said remittitur now remains in the said office of said clerk of said supreme court and upon the files of said court and is a part of the records of said court.

Second. That theretofore and on or about the 2d day of May, 1892, and before the said remittitur from said the court of appeals had been filed in or had reached said the supreme court or had reached the clerk or had been filed in or had reached the office of said clerk of said the supreme court (and subsequent to the 12th day of April, 1892, which was the date when the opinion was handed down in said the court of appeals on which your petitioner's appeal to that court was decided and the said remittitur to said the supreme court was issued), your petitioner, the plaintiff aforesaid, had served on all said defendants and had filed in the office of the clerk of said court of appeals notice of motion, moving said the court of appeals to allow a reargument of your petitioner's said appeal and to stay

the entry of said order of affirmance and of such judgment against the plaintiff meantime and for such other or further relief as should be just; that the said motion came on to be heard (by submission of printed briefs, as by the rules of said the court of appeals required) on the first day when it could be heard under said
307 rules, being May 23, 1892, the first motion day after service of the notice, and was entertained and considered by said court and was thereafter denied by said court on the merits, with an opinion handed down setting forth the grounds of said denial, whereupon an order was sent down by said court of appeals to said the supreme court (which was on the 22d day of June, 1892, filed and now remains in the said office of said the clerk of said the supreme court, in the city and county of New York, upon the files of said court and as part of the records thereof) with directions to said the supreme court in the premises; that thereafter and on or about the 22d day of June, 1892, the attorneys for said defendants procured an order upon said order of the court of appeals to be made *ex parte*, purporting to be the order of said the supreme court, which was inadvertently signed by the justice then presiding at the special term of the court at chambers of the court and by him was inadvertently directed to be entered, which contained provisions unwarranted by the law or by the practice of the court or by the directions of said order of the court of appeals, and as to which on the same (or the next) day and as soon as it was brought to the attention of your petitioner or his attorney in the action an order to show cause was made by said justice and was duly served on said defendants, requiring them to show cause why an order of the court should not be made and entered vacating and setting aside the said *ex parte* order, and why the same should not be resettled and re-entered as so settled, and for other relief; and that thereafter and after hearing all parties upon the motion made upon said order to show
308 cause, and on the 29th day of June, 1892, an order of said the supreme court of the State of New York was duly made and entered in terms as follows:

"Ordered that said motion be, and hereby is, granted; that said *ex parte* order inadvertently made and dated June 22, 1892, be, and hereby is, vacated and set aside, and be, and hereby is, directed to be resettled and re-entered in such terms as merely to make the said order of the court of appeals the order of this court and to direct that one bill of costs only be taxed for the successful party on the denial of the plaintiff's said motion in the court of appeals, and so as to include as taxable disbursements for printing in the court of appeals only the actual disbursements on that account of the counsel who there appeared as counsel for both of the defendants who opposed the plaintiff's said motion for reargument of his said appeal, and that the taxation made by the clerk June 23, 1892, be, and hereby is, vacated and set aside, and the said costs be, and hereby are, directed to be retaxed as here above directed; and it is

"Further ordered that pursuant to the directions here above given the order of the court of appeals denying with costs the plaintiff's said motion for leave to reargue his said appeal be, and hereby is,

made the order of this court, and the said motion costs of said defendants are hereby directed to be taxed by the clerk at twelve $\frac{90}{100}$ dollars, being but one bill of costs only, to be paid by plaintiff to said defendants."

Third. That the court which rendered the judgment aforesaid of May 10, 1892, and which made and entered the order aforesaid of June 29, 1892, denying your petitioner motion for reargument, was and is the supreme court of the State of New York and was and is the highest court in the State of New York in or by which a decision in the suit or a determination of the motion could be or can be had; that the said order is a final order denying said motion for a reargument as aforesaid, and that the said judgment, which was final in form when entered, has, by the force and necessary effect of said final order, now become in any and every sense and actually and for every purpose a final judgment in the suit in the said highest court of the State.

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Fourth. That your petitioner, as trustee as aforesaid, was and is the sole plaintiff in the case, and said David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, though impleaded with said Wellington Goddin, James L. Apperson, and Lewis Ginter, were and are the only defendants who appeared or were served in the case, the only defendants against whom the said verdict was directed and rendered at the trial at the circuit in favor of your petitioner as plaintiff, and that the amount of the said verdict was $30,641.50.

Fifth. That your petitioner claims to be entitled to a writ of error from the Supreme Court of the United States to said the supreme court of the State of New York upon which the said judgment may be re-examined and reversed in and by said the Supreme Court of the United States, upon the ground that in the said action a title, right, privilege, or immunity of your petitioner, as trustee as aforesaid, was and is specially set up and claimed by your petitioner, the plaintiff in the action, under the Constitution of the United States of America, and the decision of the State court therein was and is against the said title, right, privilege, or immunity so specially set up and claimed under said Constitution; that the said action was and is an action at law by your petitioner (the plaintiff), as trustee of and for the benefit of the creditors of the National Express and Transportation Company. The complaint in the action specially sets up and claims the said title, right, privilege, or immunity under the Constitution of the United States by allegations as follows:

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"First. That the defendants heretofore were copartners, and as such copartners carried on business in the city of New York and elsewhere under the firm name of 'Harrison, Garth & Co.,' in which firm name and as such copartners the defendants became the assignees, transferees, and holders of the four hundred and ninety shares hereinafter mentioned of the National Express and Transportation Company.

"Second. That the National Express and Transportation Company heretofore was and now still is a corporation of the State of Vir-

ginia, duly incorporated, organized, and existing under the laws of the said State of Virginia and heretofore carried on business as an express and transportation company in the said State of Virginia, in the State of New York, and in various other of the United States and elsewhere; that, as plaintiff is informed and believes, the defendants, as such copartners and under said firm name of Harrison, Garth &
Co., heretofore became the holders of four hundred and ninety
311 (490) shares of the capital stock of the said corporation by assignment and transfer to them from the original subscriber or subscribers for said shares, and thereby became and were received and accepted by said company as stockholders in and members of said corporation for four hundred and ninety (490) shares of the stock of the said corporation of the par value of one hundred dollars each.

Third. That under and by virtue of the contract between said corporation and the original subscriber or the several original subscribers for the shares of the capital stock of said corporation of which the defendants became the holders as aforesaid as assignees and transferees it was, for a valuable consideration, agreed by said original subscriber or subscribers for himself and his assigns or for themselves and their assigns that they severally would be liable for and pay to said corporation or to the assigns or assign of said corporation the sum of one hundred dollars on and for each and every share of the capital stock of said corporation so subscribed for in such installments and as and when such subscriber or subscribers or his or their assigns should be lawfully called upon to pay the same according to the tenor and effect of the laws under which said company was so incorporated and said subscription to and for said shares of stock was so made, whereby and by force of which said subscription said original subscribers became and were received and admitted to be
stockholders in and members of said corporation severally,
312 and, as such stockholders, severally undertook and agreed to sue and be sued, implead and be impleaded, contract and be contracted with in the name of said corporation as to any and all matters touching or affecting the property, rights, or obligations of said corporation, the National Express and Transportation Company.

"Fourth. That, as plaintiff is informed and believes, by force of the assignment and transfer to the defendants of the said shares of said capital stock and of the acceptance by said corporation of the defendants as stockholders and members the defendants as such assignees and transferees became and were and now still are liable to pay to said corporation or its assign or assigns in such installments and as and when the defendants should lawfully from time to time be called upon and required to pay the same so much of the par value of each of the shares so held by them as had not been theretofore paid on said shares at the time when the same were assigned to and became the property of the defendants, and that, as plaintiff is informed and believes, by said laws and said assignment and transfer and acceptance the defendants became and were received and admitted as stockholders in and members of said corporation

and promised, undertook, and agreed to sue and be sued, implead and be impleaded, contract and be contracted with in the name of said corporation as to any and all matters touching or affecting the property, rights, or obligations of said corporation and as to the rights, duties, and liabilities of defendants as stockholders in or members of said corporation.

313 "Fifth. That at the time the said shares were so assigned and transferred to the defendants there remained unpaid the full sum of eighty dollars per share, which had not been theretofore required to be paid to said corporation or otherwise, and which said sum of eighty dollars per share the defendants, as plaintiff is informed and believes, became and were bound to pay in such installments and as and when the same should be lawfully required to be paid under and by virtue of the laws under which said company was incorporated and said shares of stock were subscribed for and were assigned and transferred to the defendants as aforesaid.

"Sixth. That on or about the 20th day of September, 1866, the said National Express and Transportation Company, by its deed of that date duly executed, acknowledged, delivered, and recorded, assigned and transferred to John Blair Hoge, C. Oliver O'Donnell, and John J. Kelly in trust for the benefit of the creditors of said company, according to a certain order of priority established by said deed, all the property of every kind and description belonging to said company, the legal effect and operation of which said deed of trust under the laws of the State of Virginia were such as are hereinafter set forth, as established by the decree of a court of said State having jurisdiction in the premises. Plaintiff further alleges that the said trustees accepted the said trust and deed of trust and entered upon the performance of the duties thereby imposed upon them. Plaintiff further alleges that the defendants as stock-

314 holders of said corporation and contracting in that name assented to all the terms of said deed of trust, according to the legal tenor and effect of the same, and thereby became bound by all the provisions of said deed of trust as to all corporate property affected by said deed, whether such corporate property was in the possession of said corporation or in the possession of said defendants.

"Seventh. That at the time of the execution and delivery of said deed of trust the said corporation had called for and required to be paid by the persons, including the defendants, who were by law liable to pay one hundred dollars per share for the stock of said corporation subscribed for by them or held by or assigned to them severally under the contract herein set forth, only a part, to wit, twenty per centum of the par value of the shares of said stock, being twenty dollars per share, and had suffered the residue of the par value of the shares of said stock subscribed for or held by or assigned to the shareholders, to wit, eighty dollars per share thereof, to remain in the hands of the persons severally liable to pay the same, including the defendants, subject to be called for and required to be paid by such persons, including the defendants, as and when the payment of the same should be required for the purposes of said

corporation, according to the legal tenor and effect of the contract of subscription and the laws of the State of Virginia regulating said contract, and prescribing the obligations of the stockholders of said corporation."

The said complaint then proceeds with allegations duly made that the trustees appointed by said deed not having performed
315 the trusts reposed in them by the deed, a suit was instituted in the year 1871 in the said State of Virginia in the chancery court of the city of Richmond, a court of the said State of Virginia of competent jurisdiction in the premises, by a creditor of the company in his own behalf and in behalf of all other creditors of the company, against the company, its president, the several members of the board of directors, and the said three trustees under and named in the deed of trust, to obtain a judicial determination of the legal validity and effect and scope of said deed of trust and to require said company to call for so much of the said eighty dollars per share of the stock of the said company as had not been theretofore called for and would suffice to pay the debts of the company, and for an accounting had of the company's debts and of the amount necessary to pay the same, which said accounting it was sought to have taken in said suit; that the company was duly served with process as a defendant in said suit, and such proceedings were had therein that on the 14th day of December, 1880, the said chancery court of the city of Richmond, having jurisdiction of said cause and of said trustees and of said company, did adjudge, order, and decree, among other things, as follows—that is to say:

"1. That the deed of trust of September 20, 1866, hereinbefore referred to, was and is a valid deed of trust under the laws of the State of Virginia under which said corporation was created.

"2. That said deed, by its legal effect, passed to the trustees
316 therein named and their lawful successors all the property belonging to said corporation, including the amount in the hands of its stockholders and others liable to pay the same, which had not been called for by said company, to wit, the eighty dollars per share of the par value of said shares of stock that had not been called for by said company.

"3. That while by the legal operation of said deed of trust the right to receive and have said eighty per cent. of the par value of said shares of stock or so much thereof as might be necessary to pay the debts of the company passed to said trustees and their successors under said deed of trust, neither the said trustees nor their successors had any legal right to sue for or recover said uncalled amount, or any of it, of eighty per centum of said par value of said shares of stock from the persons liable to pay the same unless and until a call for the payment of the same or some part thereof should first have been made by said company or, on default of such call by said company, by the court.

"4. That there was due and unpaid by said company and secured by said deed of trust a certain amount of indebtedness to each of the persons named in said decree, including the original complain-

ant Glenn and others who had become parties to said cause as creditors of said company.

"5. That there remained no means wherewith to pay said debts, except the amount of the capital stock of said company, that had not been called for by said company, and that a call of thirty per centum of the par value of said shares of stock was necessary
317 to pay the expenses of administering the trusts of said deed and paying the creditors whose claims were established against the said trust estate by said decree.

"6. That the trustees named in said deed of trust be, and by said judgment, order, and decree they thereby were, removed from the trust, and that the plaintiff be, and thereby was, appointed to be trustee in their room and stead of said trust and under said deed of trust.

"7. That the stock and stockholders severally of said company, their legal representatives and assigns, be, and thereby were, assessed thirty per centum of the par value of the shares of stock held by them respectively or for which they were liable and requiring them to pay said assessment to the plaintiff as substituted trustee under said deed of trust, and directing the plaintiff to proceed to collect and receive said assessment or call from each and all the persons liable to pay the same.

"8. That said suit be, and thereby was, retained for further action of the court in case a further call or assessment on the stock and stockholders should be found necessary to pay the debts secured by said deed of trust and for the other purposes of said decree."

That the allegations of said complaint proceed as follows:

"And the plaintiff further alleges that afterwards and on the 3d day of January, 1881, he duly qualified as substituted trustee under said decree and was duly accepted as such by the decree of said court, by force whereof and by the laws of the said State of Virginia for such case made and provided he, the said plaintiff, then
318 and there became and was and now still is substituted to and vested with all the rights, powers, duties, and responsibilities of the trustees named in said deed of trust and became and was and still is lawfully entitled to collect and receive the said assessment or call of thirty dollars per share on each share of the stock of said corporation from the persons severally liable to pay the same, including the defendants, and the plaintiff has duly demanded payment by the said defendants of the amount due by said defendants under said decree.

"Ninth. That by force of said contract of subscription to the capital stock of said company and by force of the ownership by the defendants of said four hundred and ninety (490) shares of said capital stock, and by the legal operation of said deed of trust of September 20, 1866, and of the decrees of said chancery court of the city of Richmond of December 14, 1880, and January 3, 1881, above referred to, and of the other facts hereinbefore alleged, the said defendants became and were, as the plaintiff is informed, advised, and believes and now charges, indebted and liable to pay to said plaintiff the sum of fourteen thousand seven hundred ($14,700) dollars,

being the amount of thirty dollars on and for each and every share of the capital stock of said corporation so as aforesaid subscribed for or held by or assigned and transferred to said defendants; that being so liable to pay, the defendants, as plaintiff is informed and believes, in consideration thereof heretofore promised, under-
319 took, and agreed to pay said sum to the plaintiff when thereto requested; that the plaintiff heretofore demanded payment of the said sum to him by the defendants, but that, though thereto requested by the plaintiff, the defendants have failed, neglected, and refused to pay the same or any part thereof to the plaintiff, and are now still indebted to the plaintiff in the full sum of fourteen thousand seven hundred ($14,700) dollars, with interest thereon from the said 14th day of December, 1880."

The said allegations of the complaint constitute the plaintiff's (your petitioner's) first cause of action against the said defendants.

The said complaint then proceeds to a second cause of action against the said defendants by repeating and realleging each and every allegation made in the statement of the first cause of action, and alleging that after the said orders and decrees of December 14, 1880, and January 3, 1881, had been made and entered upon proper proceedings, as required by the laws of the State of Virginia for such case provided, the said cause which had been instituted in the chancery court of the city of Richmond, in the State of Virginia, was duly removed into the circuit court of the county of Henrico, in the said State of Virginia, a court of the said State of competent jurisdiction in the premises, in which court last named the said cause is now still pending, and that in said cause a further order and decree was, on the 26th day of March, 1886, made and entered by said circuit court of the county of Henrico, by which it was, among
320 other things and upon proper proceedings duly had, as by the laws of said State required, ordered, adjudged, and decreed that "in addition to the said call of thirty per centum, being thirty dollars per share, it was, on said 26th day of March, 1886, proper and necessary to make a further call for an assessment of the residue of fifty per centum then remaining uncalled for and unpaid upon the capital stock and stockholders of the said corporation, the National Express and Transportation Company, including the defendants; and that it was therefore further ordered, adjudged, and decreed by said court in said cause and in and by said order, judgment, and decree that a further call and assessment be, and the same thereby was, made upon the stock and stockholders (including the defendants) of said corporation, the National Express and Transportation Company, of fifty per centum of the par value of said stock, being fifty dollars for and on each and every share thereof; and that the stockholders of said corporation and each and every of them, including the defendants, and their respective legal representatives and assigns be, and they thereby were, severally required to pay the several amounts by said order, judgment, and decree called for and assessed to this plaintiff, the substituted trustee as aforesaid in said trust and under said deed of trust from said corporation of the 20th day of September, 1866, in the proceedings mentioned; and the said

trustee, this plaintiff, was by said order, judgment, and decree authorized and directed to collect and receive the amount of the said call and assessment, and to take such prompt steps toward
321 that end by suit or otherwise and in such jurisdiction as he, the plaintiff, should be advised for the purpose of paying the debts of said corporation under the provisions of said deed of trust and the expenses of administration of the trust."

And the said complaint concludes with the allegations here following:

"Third. That by force of said contract of subscription to the said capital stock and for the said shares of stock of said corporation and the assignment and transfer and the ownership of said shares and by force of said deed of assignment and transfer in trust and by force of said call and assessment so made by the said order, judgment, and decree of said court last mentioned and of the other facts here above alleged the defendants, as plaintiff is informed and believes, became and were indebted to and liable to pay to him, the plaintiff, the further sum of twenty-four thousand five hundred ($24,500) dollars, being the amount of fifty dollars per share on and for each and every of said shares of the capital stock of said corporation so as aforesaid subscribed for and to the defendants assigned and transferred or held by the defendants in addition to said indebtedness to plaintiff and said liability to plaintiff in the amount of thirty dollars per share on and for each of said shares so as aforesaid subscribed for and to the defendants assigned and transferred or held by the defendants, and that, being so liable to pay, the defendants, as plaintiff is informed and believes, in consideration thereof heretofore promised, undertook, and agreed to pay said further sum to the plaintiff when thereto requested.

322 "Fourth. That the plaintiff heretofore demanded the payment of the said further sum to him by the defendants, but that, though thereto requested by the plaintiff, the defendants have failed, neglected, and refused to pay the same or any part thereof to the plaintiff, and that the defendants are now still indebted to the plaintiff in the full amount of said sum of twenty-four thousand five — ($24,500) dollars, with interest thereon from the said 26th day of March, 1886.

"Wherefore the plaintiff, as trustee as aforesaid, demands judgment against the defendants for the sum of thirty-nine thousand two hundred ($39,200) dollars, with interest on fourteen thousand seven hundred ($14,700) dollars, parcel thereof, from December 14, 1880, and on twenty-four thousand five hundred ($24,500) dollars, parcel thereof, from March 26, 1886, besides the costs of this action."

Your petitioner further shows that by the denials of the several answers of the said defendants the material allegations of the complaint were all put at issue except that some or one of them admitted the partnership of defendants and each of said answers expressly admitted that defendants had in the month of May, 1866, caused to be purchased the said 490 shares of stock in the complaint mentioned; that on the trial of the issues in this action your petitioner

gave evidence in support of each and every allegation in the complaint made, and specially made proof of the judicial proceedings referred to of and in the said courts of the State of Virginia
323 and of the fact that the said defendants were copartners, as alleged by your petitioner, and are the persons in whose names the said 490 shares of stock stood and stand on the books of said The National Express and Transportation Company, the persons to whom and in whose names the company's stock certificates for and representing said 490 shares were issued and who received and accepted and for a time held said certificates and then sold the shares so represented and endorsed with their own hand and names the said certificates for transfer to the purchasers from defendants and received and appropriated to defendant's own use the proceeds of such sales, and specially made further proof also of each and all the several public acts of the State of Virginia under which the plaintiff (your petitioner) claimed, and your petitioner then also specially set forth and claimed his title, right, privilege, or immunity under section 1 of article 4 of the Constitution of the United States, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and your petitioner then also specially proved, among other provisions of the public acts of the State of Virginia for such case enacted, the statute of that State that "a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as it regards the company." Your petitioner further shows that it was upon and because of such proof at the trial that the learned justice there presiding, regardful of your petitioner's said right under the Constitution, directed the verdict actually
324 rendered for $30,641.50 in favor of your petitioner and against the said three defendants, with leave then given to said defendants to have their exceptions heard at the general term in the first instance, and a further direction that judgment on the verdict be suspended meantime.

Your petitioner further shows that, as the record shows, all of said matters here above alleged were made to appear to said the general term on the hearing of the exceptions; but said the general term, without regard to the facts and the law as here above recited and despite your petitioner's said right under the Constitution of the United States, sustained the said exceptions and set aside the said verdict by order there made and entered; that, upon your petitioner's appeal to said the court of appeals from said order, as the record shows, all the matters here above alleged were again made to appear, but the said court of appeals, though, in the opinion there handed down, expressly referring to the provisions of the statutes of Virginia, on which your petitioner relies, and actually quoting the words here above quoted from the law of that State, so misconstrued the public acts and judicial proceedings of that State as to effectually destroy their force and relevancy as they should be applied to your petitioner's case, and came at last to a determination which could be reached, and actually was reached, only be a denial of the said right, title, privilege, or immunity so specially set forth and

claimed by your petitioner under the Constitution of the United States.

325 Sixth. That the order of June 29, 1892, made and entered as aforesaid by the supreme court of the State of New York is a final order denying your petitioner's said motion for a reargument as aforesaid, and that the said judgment, dated May 10, 1892, rendered and entered by said court as aforesaid was final in form when entered, and has, by the force and necessary effect of said final order, now become, in any and every sense and actually and for every purpose, a final judgment in the suit in the highest court of the State of New York in or by which a judgment or decision in the suit or a determination of the motion could be or can be had.

Wherefore your petitioner prays for an allowance of a writ of error from the Supreme Court of the United States to said the supreme court of the State of New York and for such other process as will enable your petitioner to obtain a review of the case, a re-examination and reversal by said the Supreme Court of the United States of said judgment complained of, rendered in and by said State court as aforesaid, by correction of the errors alleged, and for such other or further relief as may be just.

And your petitioner will ever pray, &c.

Dated New York, August 24, 1892.

JOHN GLENN,
By BURTON N. HARRISON,
His Attorney, Petitioner.

BURTON N. HARRISON,
Of Counsel to the Petitioner.

326 UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*
City and County of New York,

Burton N. Harrison, being duly sworn, says that he was and is the attorney of record for the plaintiff in the action here above entitled; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why the petition was signed and this verification is made by deponent and not by the petitioner himself is that the petitioner does not reside within and is not now within the city and county of New York, which is the city and county within which deponent resides, but resides within and is now in the State of Maryland, where he is confined to his bed by the injuries recently suffered in a railway accident, and deponent was and is the attorney for petitioner as aforesaid, having knowledge or information as aforesaid.

BURTON N. HARRISON.

Sworn to before me this 24th day of August, 1892.

HARRY S. GOODRIDGE,
[SEAL.] *Notary Public, New York County.*

327 [Endorsed:] Supreme court, city and county of New York. John Glenn, as trustee of and for the benefit of the creditors of the National Express and Transportation Company, plaintiff, against David J. Garth, Robert A. Lancaster, and Samuel J. Harrison, impleaded with Wellington Goddin, James L. Apperson, and Lewis Ginter, defendants. Copy. Petition for writ of error from the Supreme Court of the United States to the supreme court of the State of New York, first judicial district. Original filed Aug. 26, '92. This copy filed Sept. 8, 1892. Burton N. Harrison, attorney for petitioner, 120 Broadway. Granted & writ of error allowed. Edw'd Patterson, J. S. G. Aug. 24, 1892.

Endorsed on cover: Case No. 15,130. New York supreme court. Term No., 1160. John Glenn, as trustee of and for the benefit of the creditors of the National Express & Transportation Company, plaintiff in error, *vs.* David J. Garth, Robert A. Lancaster, and Samuel J. Harrison. Filed September 13, 1892.

160 147 U.S. 360

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

JOHN GLENN, as Trustee of, and for the benefit of the Creditors of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY,

Plaintiff in Error,

vs.

DAVID J. GARTH, ROBERT A. LANCASTER and SAMUEL J. HARRISON,

Defendants in Error.

BRIEF FOR THE DEFENDANTS IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

WILLIAM C. CLOPTON,
ROBERT L. HARRISON,
JOHN R. ABNEY,
Of Counsel for Defendants in Error.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN GLENN, as Trustee of, and for the benefit of the creditors of, the National Express and Transportation Company,
Plaintiff in Error,

vs.

DAVID J. GARTH, ROBERT A. LANCASTER, and SAMUEL J. HARRISON,
Defendants in Error.

Brief for defendants in error in favor of the motion to dismiss or affirm.

This motion comes up on a writ of error to the Supreme Court of the State of New York to review a judgment or order of the Court of Appeals of said State, entered and enrolled in the said Court below in favor of the defendants, and to reverse the same on the ground that under the Constitution of the United States (Sec. I., Art. IV.) said Courts refused to give effect to certain public acts and judicial proceedings of the State of Virginia, whereunder the plaintiff claimed the "right" to enforce at law certain alleged claims against the defendants. Or, stated in general terms, the plaintiff in error seeks to enforce against the defendants in New York payment of assessments on the unpaid shares of a Virginia corporation, when it is

conclusively shown by *direct* and *undisputed* evidence, and hence determined, that they were never stockholders, in fact, of the corporation in question.

The motion is made upon four several grounds, to wit:

(1) The plaintiff in error is precluded and estopped by the judgment, which is of his own procurement, and based upon his own stipulation under the statute to abide by the same. (2) This Court has no jurisdiction to review the judgment, because it is not based upon the decision of any federal question necessarily involved in the case. (3) The grounds of the writ are frivolous, and it is manifest that the writ was taken for purposes of delay only. (4) The writ was improperly allowed on an *ex parte* application.

Statement.

The National Express and Transportation Company was a corporation organized under the laws of the State of Virginia in January, 1866. It soon after made an assignment in trust in September of that year, and forever after ceased to be a going corporation. The plaintiff, Glenn, is a resident of the State of Maryland, and the substituted trustee of that corporation. The defendants, Garth and Harrison, are residents of the State of New York. The defendant, Lancaster, is a resident of the State of Virginia. In 1866 the defendants were members of the firm of Harrison, Garth & Company, doing business as bankers and brokers on the Stock Exchange in the City of New York.

This action was commenced by the plaintiff against the defendants in the First Judicial Department of the Supreme Court of the State of New York in December, 1886, more than *twenty* years after the date of said assignment in trust, to collect 80 per cent. of unpaid subscriptions on 490 shares of the capital stock of said corporation. The amount sued for is $39,200, besides

the interest thereon, now amounting to half as much more. The action came to trial at a Circuit Term of the Court in March, 1890. The plaintiff's action rested upon contract, express or implied, and in order to make out a *prima facie* case against the defendants he offered the books of the company in evidence and then rested. The plaintiff offered no word of *direct* testimony to establish a contract relation between the company and the defendants as stockholders. The defendant, Garth, was the head of his old firm, and the only member who was familiar with the old transaction which gave rise to this suit. Mr. Garth proved conclusively that the defendants were not, and never were, stockholders of the old corporation in question; and, consequently, the General Term of the Supreme Court, and the Court of Appeals, of the State of New York, both held in elaborately written opinions that the defendants were not, and never were, liable to pay any subscriptions on its capital stock (Record, pp. 158–162, 167–177). The substance of Mr. Garth's testimony is as follows: In 1866 one Benjamin F. Ficklin, who was a resident of the State of Virginia, and one of the early incorporators of said company under its first charter, being, at the time we are now to speak of, the general superintendent of the company, was a customer of the defendant's firm—Harrison, Garth & Company—and was speculating through that firm on the Stock Exchange in the City of New York. In the spring of 1866 Ficklin applied to the defendant, Garth, who was the head and active member of his firm, to carry for him on a margin 500 shares of the capital stock of the company. The stock was unknown to the New York market, and was not dealt in on the Stock Exchange in the City of New York. Ficklin had the confidence of the firm, and he stated to Mr. Garth that he (Ficklin) could pick up the stock at his price in odd lots in Baltimore City, and elsewhere in Virginia, and would

lic acts or judicial proceedings of the State of Virginia. It passed only upon the single, fatal question above mentioned, whether the defendants were stockholders or not; and upon the decision of this one question its order directing a new trial was entered. From this order the plaintiff appealed to the Court of Appeals, having, however, no statutory right of appeal, except for a consideration given to the defendants, namely, to stipulate and assent in writing in his notice of appeal, to be made a part of the record (p. 157), that, in case the order appealed from should be affirmed, judgment absolute might be rendered against him; which under the law of New York ends all litigation in a given case where, on appeal, an order granting and directing a new trial in the Court below is sustained by the Court of Appeals. The Court of Appeals affirmed the order of the General Term and ordered judgment *absolute* for the defendants upon the plaintiff's stipulation under the statute. It handed down two elaborately written opinions in the case, concurred in by all the Judges, one written on the original argument of the case, and another on briefs filed *pro* and *con* on a motion made by the plaintiff for a reargument. By the judgment of the Court of Appeals thus entered May 10, 1892, upon its order and *remittitur* in the Court below, it is respectfully submitted that the plaintiff's case falls, and that he is thereby precluded and forever estopped from further vexing the defendants with the pretended causes of action stated in the bill of complaint.

Specification of Error.

The only error which we understand the plaintiff assigns for the writ is, namely:

That under Article IV., Section I., of the Constitution of the United States, requiring that "full faith and credit shall be given in each State to the public acts,

records, and judicial proceedings, of every other State," neither the General Term of the Supreme Court nor the Court of Appeals of New York, in the determination of the present case, gave proper effect to a public act of Virginia, which declares that "a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof, as it regards the company."

BRIEF OF ARGUMENT.

Preliminary.

The Supreme Court of the United States has no jurisdiction to review the judgment of a State Court, unless some question vital to the controversy has been determined which brings the case within the purview of the Constitution and Laws of the United States. The judgment complained of is of the plaintiff's own procurement, and he is estopped and concluded thereby; which is in the nature of a *preliminary* question, the rightful determination of which is necessarily fatal to the supposed writ of error.

The statute (Sec. 194, Code of Civil Procedure of New York) reads thus: "*Remittitur; when judgment absolute; proceedings thereon.* The judgment or order of the Court of Appeals must be remitted to the Court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the Court of Appeals determines that no error was committed in granting the new trial, it must render judgment absolute on the right of the appellant; and after its judgment has been remitted to the Court below, an assessment of damages, or any other

do so, and send it on later to the firm in New York. Mr. Garth consented to advance the purchase money on the stock when bought by Ficklin, and to carry it for him on the margin which Ficklin lodged with his firm. Ficklin, with this understanding, returned to Baltimore and Virginia, and in the course of two or three months succeeded in purchasing in lots some 490 of the 500 shares on the Board of Brokers in Baltimore and elsewhere, unknown to the defendants, in Virginia. Ficklin then ordered this stock transferred on the books of the company to the firm name of Harrison, Garth & Co., *without their knowledge and consent*, and instructed his Baltimore brokers to ship the new certificates to the firm in New York. On receiving the stock thus transferred and shipped to his firm, Mr. Garth immediately repudiated the whole transaction, and for the purposes of that repudiation endorsed the certificates in blank and returned them forthwith to Ficklin's Baltimore brokers, with instructions to cancel the transfers to his firm, and with a demand through these brokers on Ficklin to refund the money advanced by the defendants' firm on the purchase of the stock, less Ficklin's margin. Ficklin was also personally notified by Mr. Garth and called upon to take up his stock, which he was unable to do. The stock was sold at a loss for Ficklin's account by his Baltimore brokers on August 10, 1866, and the proceeds remitted to the defendants' firm in New York. Ficklin afterwards paid part of the loss on the stock to the firm and promised to pay the balance, but died before doing so. This transaction occurred when the corporation was a going concern, and not even thought to be in contemplation of bankruptcy. Mr. Garth supposed that the transfers to his firm on the books of the company had been properly retransferred or canceled, and knew no better until the trial of this action, some twenty-four years after the sale of the stock. He was a busy man, and the only interest he took in the stock after repudiating

the transfers, was to get his firm's money back (Record, pp. 129-136). It is not necessary here to say more about the facts of this case. Its merits have already been satisfactorily and exhaustively discussed in printed and oral arguments before the highest Courts of the State of New York, and it is due to justice that the decisions of these learned Courts should end the litigation. Upon this state of *undisputed* facts the Justice at *Nisi Prius*, in order to preserve without prejudice the rights of all parties to the litigation, ordered a *pro forma* verdict for the plaintiff, suspended entry of judgment, and sent him up, together with the defenddants' exceptions, to a General Term of the said Supreme Court, in the first instance for judgment in the case according to law. There were no controverted facts whatever in the testimony, and a jury would necessarily have been compelled to render a verdict for the defendants on the undisputed evidence. At the hearing before the General Term the Court considered only one question in the case, plaintiff's counsel insisting that this was the only question it could properly pass upon, namely, the effect of Mr. Garth endorsing the certificates when he repudiated and returned them to Ficklin's brokers in Baltimore. The plaintiff insisted that the effect of this endorsement was an affirmance and ratification of the *unauthorized* transfer. The defendants insisted that such a contention was an absurdity in law, and that an act intended as a repudiation and accompanied by a repudiation of an unauthorized act was nothing other than a repudiation of that act in law. The General Term vigorously sustained the defendants' view of the case in an elaborate opinion written by that right learned and honored Justice, GEORGE C. BARRETT, of the Supreme Court of New York, sustaining the defendant's exceptions and granting their motion for a new trial. It is a mistake of the plaintiff to allege or intimate in his assignment of error that the General Term misconstrued, or even construed, any pub-

proceeding requisite to render the judgment effectual, may be had in the latter court."

Section 190 of said Code, defines the jurisdiction of the Court of Appeals ; and the *limitations and qualifications* of this jurisdiction are defined under Section 191 of said Code. We quote such parts thereof as are necessary for this motion, to wit, of Section 191 : " But the jurisdiction conferred by the last section " (namely, 190), " is subject to the following limitations, exceptions, and conditions " :

1. " An appeal cannot be taken from an order granting a new trial on a case or exceptions, unless the notice of appeal contains an assent on the part of the appellant that, if the order is affirmed, judgment absolute shall be rendered against the appellant."

Under the statute and decisions of New York the judgment, therefore, of the Court of Appeals is simply adopted by, and ordered enrolled in, the Court below for purposes of enforcement. Beyond this the lower Court has no jurisdiction to act.

In Macgregor vs. Buell, 17 Abbott's New York Practice Reports, page 34, MILLER, J., says :

" Upon the application for judgment upon a remittitur, after an appeal has been decided by the Court of Appeals, the party in whose favor the judgment is given applies to the Court from which the appeal was taken for an order that the decision or judgment of the Court above shall be and become the decision and judgment of the Court below, and the only power vested in the inferior tribunal is to adjudge that the judgment of the Court of Appeals be enforced as provided by the Code. Beyond this there is no jurisdiction to act."

This Court, therefore, now has practically before it for consideration a judgment of the highest Court of the State of New York. The question arises, then, how did the Court of Appeals get jurisdiction ? The statute answers that question, namely, by the plaintiff, appellant, stipulating away all his rights to further liti-

gation, and assenting in his notice of appeal that, in case the Court of Appeals affirmed the order of the lower Court directing a new trial, judgment absolute might be rendered against him upon the stipulation. Thus the affirmance of the order and the judgment entered below of the Court of last resort closes the litigation under both the statute and the plaintiff's stipulation, for such is the legal affect of the stipulation under the statute. Thus the Court of Appeals in defining the statute in Roberts vs. Baumgarten, 126 N. Y., p. 340, by RUGER, Ch. J., say: "The judgment sought to be vacated in this case was one which was entered in the Superior Court upon a remittitur from this Court ordering judgment absolute in favor of the defendant. This judgment was based upon a stipulation given in pursuance of the statute, by the plaintiff agreeing that judgment absolute should be rendered against him, in case the judgment appealed from should be affirmed in this Court. Such a judgment is in no respect based upon a trial and determination of an issue of fact, but is *founded solely upon the consent of the party making the stipulation.* It did not, in any respect, *depend upon the merits of the controversy* as between the parties, or the determination of questions of fact originally made by the trial Court, but was founded upon the agreement of the parties that a certain result should follow the decision of this Court upon the questions of law presented to it by the record in Court (Cobb vs. Hatfield, 46 N. Y., 535; Hiscock vs. Harris, 80 *Id.*, 402).

The plaintiff had the option presented to him by the order of the General Term granting a new trial, to go back and have another trial of the case, or by stipulating that *judgment absolute* in the case *might follow the decision of this Court*, to come here and review the decision of the General Term upon questions of law. The plaintiff had *no right of appeal to this Court*, except upon the condition that he would submit the *whole con-*

troversy upon the result reached in this Court. This subjected him to the *risk of being defeated* in the action by an adverse result in this Court upon the special questions submitted to it by the record, and he must be deemed to have considered that question and deliberately consented that the judgment ordered by this Court *should be final in respect to the cause of action stated in the complaint.*

There can be no question but that a party has *for a consideration* the right to waive privileges given him by a statute and agree upon a mode of trial which *shall preclude him from afterwards availing himself of rights which he might otherwise have.* By giving the stipulation in question, the plaintiff secured a right of review which he *could not otherwise have had*, and there is no reason or justice in permitting him to violate his agreement, because his experiment has not turned out as he expected it would. The statute is explicit that a party cannot review in this Court *an order* of the General Term *granting a new trial*, except upon the *condition* that he shall stipulate for *judgment absolute* in case he does not succeed in obtaining a reversal of the order appealed from (Sub. 3, § 12, Code of Pro., 1848; Sub. 1, § 191, Code of Civ. Pro.); and to hold that the party who sustains such an order in this Court does not secure an *absolute judgment*, would nullify the express provisions of the statute and deprive the stipulation of the party of any meaning or effect. These provisions of the Code *are general*, and *no exception* has been made in the case of actions of ejectment, and no authority exists for omitting such action from the operation of the rule prescribed by the Code. To hold otherwise would involve the right of the Court to disregard the express statutory provisions and establish a broad exception to the operation of a statute which was undoubtedly intended to be *general* and *comprehensive* in its require-

ments. The order of the Court below should, therefore, be affirmed, with costs."

Here, then, it is respectfully submitted, the Supreme Court of the United States has no jurisdiction to review the judgment in this case, for the plaintiff has stipulated away for a consideration any right he otherwise might have had to come here and ask for a review of that judgment, and this Court will not permit him to violate his stipulation, and thereby overreach and, practically, *annul* a statute of the State of New York. The plaintiff says he seeks here to enforce a statute of a sister State, and in order to do that he asks this Court, practically, to annul a statute of the *lex fori*, to restore to him rights which he voluntarily surrendered by creating new ones for him, and to violate the Constitution of the United States, whose integrity he seems to be so jealous of. The plaintiff cannot blow both hot and cold. The proper practice for him to pursue was to go back and submit to a new trial, and, in case of dismissal of his complaint at Circuit, go then to the General Term, and from the General Term to the Court of Appeals; and, if he had a case, from the latter Court, on writ of error, to the Supreme Court of the United States. But he did not do this. He elected to deprive the defendants of the new trial they moved for and obtained by availing himself of his conditional statutory right to a review of the General Term's order by the Court of Appeals, and stipulated away all his rights by assenting, under the statute, to abide by the result reached in the Court of Appeals. That Court simply affirmed the order of the lower Court directing a new trial, and under both the statute and the plaintiff's stipulation the Court was compelled, on affirmance, to render judgment absolute against the appellant, thus closing up the litigation "in respect to the cause of action stated in the complaint;" for the judgment is founded solely upon the appellant's stipulation under the statute. The Supreme Court of the United States

is therefore practically asked to review, now, an order of the lower Court directing a new trial in this case; for to review the judgment of the Court of Appeals would be to repeal and annul the New York statute and encourage and permit the plaintiff in error to violate his own stipulation. But the rule is well settled that a judgment or order by a State Court directing a new trial in a given case is not subject to review by the Supreme Court of the United States.

Bostwick vs. Brinkerhof, 106 U. S., 4.
McComb vs. Com. Knox County, 91 U. S., 1.
Parcels vs. Johnson, 20 Wall., 653.
Rankin vs. State, 11 Wall., 380.
Houston vs. Moore, 3 Wheat., 433.
Gibbons vs. Ogden, 6 Wheat., 448.

It is only an *unconditional, definitive* judgment strictly on the merits which can thus be reviewed. In 106 U. S., 4, *supra*, Mr. Chief Justice WAITE, speaking for the Court, says: "If the judgment is not one which disposes of the whole case *on its merits*, it is not final. Consequently, it has been uniformly held that a judgment of reversal with leave for further proceedings in the Court below cannot be brought here on a writ of error" (see cases cited in the opinion). Now, the Court of Appeals in 126 N. Y., 340, *supra*, speaking of a judgment precisely similar to the one under consideration, unanimously say: "Such a judgment is *in no respect* based upon a trial and determination of an issue of fact, but is founded solely upon the consent of the party making the stipulation. It did not, in any respect, *depend upon the merits of the controversy* as between the parties, or the determination of questions of fact originally made by the trial Court, but was founded upon the agreement of the parties that a certain result should follow the decision of this Court upon the questions of law presented to it by the record in Court."

The judgment or order in this case is founded *solely*

upon a condition; and yet, notwithstanding that, it is founded, as the Courts below say, upon the truth and justice of the case.

This Court, therefore, cannot review the judgment or order now before it without expressly violating the defendants' adjudged statutory rights, as well as their common-law rights to a new trial by jury granted them or their motion by the order of the General Term, which was affirmed by the Court of Appeals; nor without violating the express stipulation upon which their rights were staked and preserved by the statute and the courts; nor without practically repealing and annulling the statute of the *lex fori*, and thereby creating special rights and advantages in favor of the one party over the other. The judgment is of the plaintiff's own procurement, and based upon his own stipulation, and, like a judgment by default or confession, there is no appeal from it. This Court will not, therefore, harm the defendants by permitting the plaintiff in error to violate both the statute and his solemn pledge. The motion to dismiss for these reasons alone should be allowed.

First.

No Federal question lies under the judgment under consideration, and none of a Federal nature was raised which was necessary to a proper determination of the case, or vital to the controversy between the parties. The judgment, as founded in justice, is simply the evolution or natural result of a proper determination of the defendants' *unwritten* or common law rights. Nowhere in the complaint or record does it appear that the plaintiff claimed any "right, title, privilege or immu-

nity" against the defendants under the Constitution or laws of the United States. And that pretension which is now for the first time foreshadowed in his assignment of error is altogether an afterthought unworthy of this Court (Texas Pac. R. vs. Sou. Pac. Co., 137 U. S., 48). The plaintiff now claims that under the Constitution (Article IV., Sec. I.) neither the General Term nor the Court of Appeals gave effect to a public act of Virginia, which declares that "a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as it regards the company." But for the purpose of determining the case properly it was positively unnecessary for the courts of New York to construe the act of Virginia. The General Term determined the case wholly upon that theory, and did not in its opinion refer once to the act of Virginia, because it was unnecessary. For, as was said by this Court, in Burgess vs. Seligman (107 U. S., 32), quoting the Court of Appeals of New York, "there is nothing in any statute which makes the books of the company incontrovertible evidence of ownership of stock." The General Term decided only what the defendants' *unwritten* or common-law rights were, and held that they were not and never were stockholders in the corporation represented by the plaintiff. The Court of Appeals proceeded to a determination of the case upon precisely the same theory. It is true that the Court referred in its opinion to the statute of Virginia, and placed a certain construction upon that statute. But it was only in an incidental way and for the purpose merely of refuting the absurd contention of the plaintiff, namely, that, if a person's name appears upon the books of the company rightly or *wrongly*, he is nevertheless a stockholder and liable to corporate creditors. If this were the true rule, a person's property, who was placed without his knowledge or assent in such an unfortunate situation, could be taken without due process of law,

and his so-called natural and *inalienable* rights would be a mere myth.

In answer, therefore, to this unworthy contention, the Court of Appeals said: "It is obvious (Record, p. 170) that any enactment which enabled a wrongdoer to load upon a stranger the heavy responsibilities of a stockholder without his knowledge or assent would be an outrage upon the rights of the individual not to be expected. The statutes of Virginia accomplish no such wrong, but operate reasonably within certain well-defined limits." And, referring to the above-quoted statute, the Court said: "The plain meaning is that the corporation which has acknowledged the ownership and accepted its evidence, and admitted it upon its records, shall not be at liberty to dispute it. Its meaning is *not* that it shall be *conclusive* against the alleged stockholder. Indeed, in Vanderwerken vs. Glenn (85 Va., 9) the Court state the rule to be that the record upon the corporate books is *prima facie* evidence of the ownership, and after examining all the cases referred to we find none which venture any further." Again the Court said, on denying a motion for a reargument: "The statute of Virginia (Record, p. 176) makes those and only those stockholders '*as it respects the company*' whose names are registered on its books as such, and that enactment, thus requiring an acceptance and recognition of the stockholder by the corporation, shows that it is a *contract relation* which is contemplated, and involves an actual assent on both sides. The seeming intimation ventured on behalf of the appellant that the effect of that act is to make one conclusively a stockholder whose name was registered, whether he knew and assented or not, is too plainly unendurable to require serious discussion. No one can be made a stockholder without his consent, express or implied; and so there is no view of the subject which can dispense with proof of that assent by the defendants as a vital and necessary element of the plaintiff's case." It

is perfectly plain that the words, "as it regards the company," can imply no meaning beyond the administrative functions of the company, such as voting the stock by the person of record at a general election, &c., which the company could not dispute. The Court very properly held that the statute of Virginia was not reached in the case, and that the plaintiff must necessarily prove first by *competent evidence* that the defendants were stockholders before the statute could possibly take effect. It nowhere denied the validity of the statute of Virginia, or any "right, title, privilege or immunity" of the plaintiff under the Constitution, but predicated its decision wholly upon the "primary fact," namely, that, upon the undisputed evidence, the defendants were not and never were stockholders in the corporation represented by the plaintiff.

The General Term said: "A great many important questions (Record, p. 158) are presented by this appeal, but, in the view which we take of the *primary fact*, it will not be necessary to consider them. Upon a careful review of all the evidence adduced upon the trial, we are of opinion that the defendants never became stockholders of the corporation represented by the plaintiff, and consequently are not responsible for the unpaid assessments sought to be recovered in this action." And after reviewing all the testimony the Court said: "There can be (Record, p. 161) but one conclusion of law properly deducible from this state of facts. No person can be made a stockholder without his knowledge or consent (Matter of Reciprocity Bank, 22 N. Y., 9; Keyser vs. Hitz, 133 U. S., 138). And, as was said by EARL, J., in McMahon vs. Macey, 51 N. Y., 161: 'There is nothing in any statute which makes the books of the company incontrovertible evidence' on that head. The actual fact may always be inquired into, and if it be shown that the *transferee* upon the books never consented to accept the shares, the transfer to him is simply *null and*

void (Morawetz on Corporations, Sec. 223, and authorities there cited). 'It is,' as was said in Cartmell's case (9 Ch. App., 694), 'of the essence of a transfer that it should be accepted by the transferee' (see also Hennessey's Executors case, 3 De G. & S., 191, and Chapman and Barker's case, L. R., 3 Eq., 361)." In this last case (pp. 365-6) Vice-Chancellor PAGE-WOOD says: "If the mere placing a name upon the register, rightly or wrongly, is to give the creditors the right to proceed against the individual, *any one of us now in this Court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder; * * * the case is wholly different where a person agrees to have his name put upon the register for any purpose.*"

The General Term in closing its opinion says: "Nor did the defendants by any neglect or default bring themselves within the rule that a person who permits his name to appear and remain in its outstanding certificates of stock, and on its register as a shareholder, is estopped as between himself and the creditors of the bank to deny that he is a shareholder (Whitney vs. Butler, 118 U. S., 655). That doctrine applies to one who actually is a shareholder in fact as well as upon the books of the company, and who transfers his shares to a given person. It is ordinarily his duty to see to it that the latter causes the proper transfer to be made upon the books of the company. But here the defendants were not shareholders *in law or in fact*, and they made no transfer to any given person. They simply disaffirmed the unauthorized act, whereby their names were inserted in the certificates as shareholders, and placed as such upon the books of the company. They had then no means of transferring the shares to any given person. The shares had not been resold when they repudiated

the transfer to themselves, and, consequently, there was no person to whom the retransfer could be made when such repudiation took place. What they did do was *all* that they could do, namely, to return the shares to the Baltimore brokers, with instructions to sell them at once and have them transferred from their names; and it appears that when McKim & Co., in obedience to these instructions, resold the shares, the books of the corporation were *closed*, and it was then too late to make the retransfer. Indeed, the company made its assignment the following month, and since then has ceased to be a going corporation. Under these circumstances, it cannot be said that the defendants have done or omitted to do anything which entitles the plaintiff, as the representive of the company, or of the creditors, to invoke against them the doctrine of estoppel. Upon both *the facts and the law*, therefore, we think that the complaint should have been dismissed. As to the other points which were presented we need only say that we have grave doubts as to the plaintiff's rights to maintain this action, and that in *several* respects *his* position with regard to this hard and stale demand fails to commend itself to our sense of equity and justice; but these questions need not be passed upon, as the *single consideration* already discussed is sufficient to dispose of the entire case. The exceptions must therefore be sustained and a new trial ordered, with costs to abide the event."

VAN BRUNT, P. J., concurs.

Now, it was from the order entered upon this decision directing a new trial of the cause that the plaintiff appealed to the Court of Appeals, stipulating that, in case that Court affirmed the order, judgment absolute might be rendered against him in favor of the defendants. Not being satisfied, however, with the decision of the Court of Appeals, the plaintiff filed a long brief in that Court on a motion for a reargument of the case, which the Court after full deliberation denied, stating its rea-

sons in an incisive and conclusive opinion, which is printed with the original opinion in the record.

The conclusion of the Court was, to wit: "The order should be affirmed, with costs, and with judgment absolute against the plaintiff upon the stipulation" (Record, p. 171).

Then, under what article of the Constitution, or law, of the United States, it may be asked, does a Federal question arise in this case? Not only was no such question raised in the pleadings, or at the trial, or before the appellate Courts of New York, on the oral arguments, but none was raised in the plaintiff's brief, as will be seen by reference to the "points" of that brief, where the case is reported at large (Glenn vs. Garth *et al.*, 133 N. Y., 20).

It is little short of rashness for the plaintiff in error now to allege or intimate to this Court that the Court of Appeals refused to give effect to the statute of Virginia. On the contrary, the Court gave full weight to that statute. But the Court held that neither the statute nor the question of estoppel in behalf of the equitable rights of creditors was reached in this case; as, first, it was necessary to prove by *competent* evidence that the defendants were stockholders, and a contract relation established between them and the company. And, in answer to the contention of the plaintiff in behalf of the so-called equity of creditors argued at length in his brief, filed on the motion for reargument, the Court said: "To manufacture an equity out of such material to shut out the truth is little short of nonsense."

What Federal question, then, was decided in order *to induce* the judgment in this case? If any such question was decided, the judgment did not rest upon it, the test of which is fatal to the writ. As was said by Mr. Justice STORY, in Crowell vs. Randall (10 Pet., 368), "the question * * * must have been decided in order to have *induced* the judgment;" and by Mr. Justice CATRON, in Armstrong vs. Athens Co. (16 Pet., 281),

"that the State Court *could not* have given the judgment or decree without deciding such a question;" and by Mr. Justice MILLER, in Murdock vs. Memphis (20 Wall., 590), in order to give this Court jurisdiction over the judgment of a State Court, "that its decision (the federal question) was *necessary* to the judgment or decree rendered in the case; * * * and, if it (the Federal question) was erroneously decided * * * then this Court must further inquire whether there is *any other* matter or issue adjudged by the State Court which is *sufficiently broad* to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the Federal question;" and by Mr. Justice WAITE in Balling vs. Lersner (1 Otto, 594): "We cannot re-examine the judgment * * * simply because a Federal question was presented to that Court for determination. To give us jurisdiction it must appear that such a question was, in fact, decided, or that its decision was *necessarily involved* in the judgment or decree as rendered;" and again by the Chief Justice in Citizens' Bank vs. Board of Liquidation (8 Otto, 140), "it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause."

The revisory jurisdiction of this Court over the judgments of State courts depends upon the decision of one or more of the questions specified in § 709, Rev. Stat., and *in the way there mentioned*. These questions were again passed upon in Detroit R. R. vs. Guthard (114 U. S., 133), and the rule was reiterated by this Court that it must not only appear upon the record that the Federal question was there *raised* and *decided*, but also that the decision was decisive or controlling in the cause, and that the State court denied a "right, title, privilege or immunity," specifically set up and claimed by the plaintiff in error (Brown vs. Colorado, 106 U. S., 95, 97; Jacks vs. Helena, 115 U. S., 289;

Texas and Pacific R. Co. vs. Southern Pacific Co., 137 U. S., 48).

Where then, under the Constitution, or under Section 709 of the Revised Statutes, of the United States, has the plaintiff in error been deprived of any " right," or " title," by the decisions and judgment in this case ? Surely, the solemn judgments of the highest State courts do not depend upon such " shadowy suggestions " of centralization as are to be evolved from the record in this case. There is no statute which can deprive a person of his natural or common-law rights to be heard ; and none which can condemn him in life, limb, liberty or property until he is heard.

The so-called decree of the Virginia court against the express company is not such a " judicial proceeding " under the Constitution of the United States as would deprive the defendants of their common-law rights. It is not a judgment *in personam*, which would deprive them of any defenses they might have to an action in this or a foreign jurisdiction. The decisions of the highest State Courts of Virginia confute this proposition. If this were the rule, why then the necessity of suing the defendants at law ? Why not sue directly on the judgment ? The contention is manifestly absurd. The writ should be dismissed for want of jurisdiction in this Court.

Second.

The grounds of the writ are frivolous, and it is manifest that the writ was taken out in bad faith and for delay only. The decision in this case was rendered by the Court of Appeals on April 12, 1892 (Record, 167). By reason of the plaintiff making a motion for a rear-

gument, entry of judgment in the court below was delayed until May 10, 1892 (Record, 164). The judgment entered was for about $2,500, costs, &c., against the plaintiff in error, upon which execution was issued and returned wholly unsatisfied before the writ was taken out. The plaintiff having no money to pay the judgment, and the execution being returned *nulla bona*, it was determined to sue the plaintiff's bondsmen on the appeal bond, to which they strenuously objected. The plaintiff in error thereupon, to wit, August 24, 1892 (Record, 4), took out the writ of error in this case, and obtained a *supersedeas* staying the defendants from prosecuting their judgment on the bond. This writ was obtained on an *ex parte* application made to a Judge sitting at Chambers *three months and a half* after entry of the judgment. No plausible reason whatever can be assigned for the delay.

In view, therefore, of the foregoing conclusions of law, and by reason of these facts, it is respectfully submitted that the writ was taken in bad faith and for the purposes of delay only, and to deprive the defendants of their just rights to the collection of their judgment against this plaintiff. In other cases similar to this one in the different State jurisdictions, which have been decided adversely to this plaintiff, no writs of error have been taken and no appeals to this Court; and the question arises, Why was the writ taken in this particular case? The amount of the judgment is large, and that very likely had great weight in the purpose of suing out the writ. The plaintiff had no money to pay the judgment, and he doubtless moved for the writ to save his bondsmen the annoyance of an action at law. But there are other and sufficient reasons for his obtaining the writ for delay, which we are not at liberty to state, as the facts upon which they are based are outside the record.

In bringing the present action the plaintiff selected his own forum, notwithstanding the fact that the de-

fendant, Lancaster, is a resident of Virginia, the domicile of the corporation; and the action was not commenced in the New York jurisdiction until after the expiration of *twenty* years from the date of the deed of trust or assignment, to wit, September 20, 1866. The complaint was sworn to by the plaintiff on information and belief. If this action, therefore, was brought against these defendants in good faith, why this great delay? Under the decisions, and under every statute of time based upon the common or civil law, such a deed of assignment is a nullity after the expiration of twenty years from its date. It has been impliedly held, in one of these cases, by the Supreme Court of the United States, and expressly held by the Court of Appeals of Virginia, the venue of the deed, and by the Supreme Court of Alabama, that such a deed of assignment is valid for only *twenty* years after the date thereof. The presumption of payment in that time is absolute, and rests upon the doctrine of *prescription* and uninterrupted repose.

Hawkins vs. Glenn, 131 U. S., 333; Semple vs. Glenn (Ala.), Southern Reporter, Vol. 9, No. 9 (June 24, 1891), pp. 267–8; Smith vs. Virginia Midland R., 33 Grattan, 617; Hambleton vs. Glenn, 13 Virginia Law Journal, 242; Bowie vs. The Poor School, 75 Va., 300; Matter of Neilly, 95 N. Y., 383, 390–1.

The Court of Appeals, in its opinion denying the motion for a reargument, refers to the plaintiff's extraordinary brief filed on the motion, and to the antiquity of the alleged cause of action in the words following, to wit: "We have said that there is no proof of such assent. The appellant's counsel, however, insist that there is some proof of it, and enough to raise a controverted question of fact, upon which the verdict directed by the Court is as conclusive upon us as would be the verdict of a jury. That, we are quite sure, is a mistake.

We discover no such proof. To find any it would be necessary to separate some single fact from its surroundings and pervert the just inference to be drawn from it. Neither party asked to go to the jury. Both assumed that the material facts were undisputed. The defendants upon them raised a question of law by a motion for a non-suit, which was denied and an exception taken. Judgment was suspended, and the exceptions ordered to be heard at the General Term. The plaintiff was required to go there for his judgment, and get it by defeating the exceptions. He made the case himself with that notice and peril before him, and it is not to be presumed that he omitted anything essential. The judgment of the General Term determined that assent to the stockholder's relation was necessary to be proved, but that there was no evidence to prove it, but, on the contrary, proof of express dissent. In that view we concurred, and decided not a question of fact, but one of law.

"Much more might be said as a commentary upon the plaintiff's brief, but the cause of action sued upon is already about a quarter of a century old, and will grow still more venerable if we do not somewhere end the discussion. The motion should be denied with costs. All concur" (Record, 176).

For these reasons it is respectfully submitted that the writ should be dismissed on the ground that it was sued out in bad faith and for manifest delay.

Third.

The writ of error was improperly allowed. The Constitution of the State of New York (Art. VI., Sec. 7), provides for General Terms of the Supreme Court

to be composed of a presiding Justice, who "shall continue to act as such during his term of office," and "not more than three other justices, who shall be designated according to law from the whole number of justices." These General Terms in each Judicial Department serve as appellate tribunals for the hearing of all causes carried up from the special and circuit terms of the Supreme Court in the respective departments. The General Term of the First Department, in which the present action was brought, is composed of Presiding Justice VAN BRUNT and two Associate Justices. Mr. Justice PATTERSON, who signed the citation and writ in this case (Record, 3, 4), is not an Associate Justice of the General Term. The reasons he states (Record, 4) for signing the writ are not sufficient in law. When he allowed the writ on an *ex parte* application, he was sitting at Chambers, called Special Term, and the absence of the Presiding Justice of the General Term is not a sufficient excuse for his allowing or signing the writ. Besides, there was no excuse for the plaintiff in error delaying the application for the writ until the absence of the Presiding Justice from the bench and the temporarily coming in of Mr. Justice PATTERSON at Chambers. The least that can be said is that the Justice was imposed upon, as his attention was, doubtless, not called to the provisions of the Revised Statutes of the United States, nor to the plaintiff's stipulation to abide by the judgment of the Court of Appeals, or the statute affecting the stipulation. If any Justice of the Supreme or lower Court had power or jurisdiction to allow the writ, it is submitted that only the Presiding Justice of the General Term of the First department was clothed under the statute with that power. But it is insisted that the only State Judge who could properly allow the writ was Chief Judge EARL, of the Court of Appeals, the Court passing the decree. The lower Court is simply the custodian of

the Court of Appeals' judgments, lodged there merely for purposes of record and enforcement. Beyond this the lower Court has no jurisdiction to act, as we have seen. It would be rather an anomaly in the administration of justice if a lower Court could inflate itself with the power to order the judgments of its superior reviewed, and thereby attempt to evade the express orders of the higher or appellate Court.

Writs of error to State Courts have never been allowed as a matter of right. In Twichell vs. Commonwealth, 7 Wall., 324, Mr. Chief-Justice CHASE says: "It has always been the practice to submit the record of the State Courts to a Judge of this Court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper Court of the State, and whether the case upon the face of the record will justify the allowance of the writ."

Gleason vs. Florida, 9 Wall., 783, 784.
Sec. 999, Revised Statutes U. S.

This section provides that when the writ is issued to a State Court, "the citation shall be signed by the Chief Justice, or Judge, or Chancellor of such Court rendering the judgment or passing the decree complained of." Under the statute not even an associate Justice has the power to allow the writ, unless he is presiding in the place and stead of the Chief Justice, which was not the case with the Justice who signed the present writ, which is not pretended (Bartemeyer vs. Iowa, 14 Wall., 27; Butler vs. Gage, 138 U. S., 52; Palmer vs. Donner, 7 Wall., 541.

The statute, it is submitted, never intended to clothe Judges of inferior Courts, sitting at Chambers, with the power to allow or sign writs of error to State Courts. If so, the Supreme Court of the United States would be flooded with motions to dismiss or affirm. The fact that Mr. Justice PATTERSON signs himself as presiding

Justice of a Special Term of the Court carries with it no force in the sense intended by the statute. It does not clothe him with the power of a Supreme Court Justice of the United States, nor with that of the Chief Justice of the Court "passing the decree," nor with the appellate power to order a *judgment by consent* of the Court of Appeals of the State of New York to be reviewed by the Supreme Court of the United States, and that upon the most frivolous pretext.

It is submitted that neither Chief Judge EARL, of the Court of Appeals, nor a Justice of this Court would have allowed the writ.

For these reasons the writ should be dismissed; or, if the Court takes jurisdiction, the judgment should be affirmed on the ground that the writ was taken for manifest delay.

Dated New York, Nov. 3, 1892.

Respectfully submitted,

WILLIAM C. CLOPTON,
ROBERT L. HARRISON,
JOHN R. ABNEY,
Of Counsel for Defendants in Error.

147 U.S. 360

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 1160.

JOHN GLENN, as Trustee of and for the benefit of the creditors of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY;

Plaintiff in Error,

against

DAVID J. GARTH, ROBERT A. LANCASTER and SAMUEL J. HARRISON,

Defendants in Error.

BRIEF

of BURTON N. HARRISON, of Counsel for Plaintiff in Error, in opposition to the Motions to dismiss the Writ and to affirm—and to show that, as the Defendants in Error have by their Motion to affirm submitted the case to be disposed of on the merits, the Judgment complained of should be now reversed.

The Motions to dismiss and to affirm were noticed for and submitted on November 28, 1892, by Counsel for Defendants in Error; and the Court then gave leave to the Counsel for Plaintiff in Error to file Briefs December 19, 1892.

C. G. Burgoyne, Walker and Centre Sts. New York.

Supreme Court of the United States,

OCTOBER TERM, 1892.

TERM No. 1160.

JOHN GLENN, as Trustee of, and for the benefit of the creditors of, the National Express and Transportation Company,
Plaintiff in Error,

against

DAVID J. GARTH, ROBERT A. LANCASTER and SAMUEL J. HARRISON,
Defendants in Error.

The motions were submitted November 28, 1892, by Counsel for Defendants in Error: and leave was then granted by the Court to the Counsel for Plaintiff in Error to file Briefs before or on December 19, 1892.

Separate Brief of Burton N. Harrison, of Counsel for Plaintiff in Error, in opposition to motions to dismiss or to affirm.

The preliminary motion is to dismiss the writ of error; the ground on which it is made is set forth in the notice of motion in these words: "Because the "judgment or decree sought to be reviewed here is a "judgment or decree of the highest Court of one of "the United States, to wit, the Court of Appeals of the "State of New York, entered and enrolled in the Su-

"preme Court of said State"—whatever that may mean as the basis of such a motion in this Court under Section 709 of the Revised Statutes of the United States. With it is also made a motion to affirm the judgment sought to be reviewed.

In the brief for defendants in error, which accompanied the notice of motion, it is said:

"The motion is made upon four several grounds:

"(1) The plaintiff in error is estopped by the judg-
" ment, which is of his own procurement, and based
" upon his own stipulation under the statute to abide
" by the same. (2) This Court has no jurisdiction to
" review the judgment, because it is not based upon the
" decision of any Federal question necessarily involved
" in the case. (3) The grounds of the writ are frivol-
" ous, and it is manifest that the writ was taken for
" purposes of delay only. (4) The writ was improperly
" allowed on an *ex parte* application."

After statement of the material facts of the case, the three grounds alleged for the motion to dismiss will be first considered in their order—and then the motion to affirm.

Statement.

This action was commenced October 28, 1886 (fols. 6 and 7 of the Printed Record), by the plaintiff in error, as plaintiff below, to recover from the defendants in error and others, defendants below, the amount of two assessments made by courts of the State of Virginia upon the stock and stockholders of the National Express and Transportation Company, a corporation of the State of Virginia (fol. 7), the one assessment, for thirty dollars per share, having been made by decree of the Chancery Court of the City of Richmond, on the 14th day of December, 1880 (fols. 10–12), in a suit there pending (against the corporation, its president and individual directors, and the three trustees named in

the deed of trust here below mentioned) by a creditor of the company suing in his own behalf and in behalf of all other such creditors; and the other assessment, for fifty dollars per share, having been made March 26th, 1886 (fols. 12, 13) by the Circuit Court of Henrico County, to which court said suit had been removed from the Chancery Court of the City of Richmond. The company had itself made several calls or assessments upon the stock and stockholders, aggregating twenty dollars per share, and, being in debt in a considerable amount, but (because of the more than three millions of dollars still uncalled upon the stock of subscribers holding an aggregate of more than forty thousand shares of the capital stock) not insolvent, had, on the 20th of September, 1866, made, in Virginia and under the laws of that State, an assignment of all its property to three trustees for the benefit of creditors, and had shortly afterwards ceased to carry on business as a going corporation. The creditors had made every effort to collect their claims, but soon found they could look only to the fund consisting of the uncalled liabilities upon the stock; the company's Board of Directors and stockholders neglected to make any assessments to collect from the stockholders the moneys needed to pay the admitted and just debts; the trustees, under the deed of trust mentioned, were rendered unable to perform their trust, because of injunctions and other proceedings against them in various of the States, procured by stockholders, of which injunctions one is in evidence in the printed record of this case (fols. 137–140), having been granted in October, 1866, in a stockholders' suit in the Supreme Court of the State of New York, against the company, its president, directors and those trustees—an injunction which remained in full operation until April 2, 1886, when it was finally dissolved and the complaint in the action was dismissed (fols. 147–149); and, as a last recourse, the said creditors' suit in the Chancery Court of the City of

Richmond was commenced to procure an adjudication as to (among other things) the validity of the deed of trust, and the meaning and effect of it, and to have an assessment or assessments made by the court upon the stockholders to pay the company's just debts. The record of the judicial proceedings of the courts of Virginia in that creditors' suit is in evidence (fols. 71–111), and shows (fols. 91–96) that, among other things, the Virginia courts ascertained the debts, *held* the deed valid, the stockholders liable to assessment for the eighty dollars per share not theretofore called for by the Board of Directors; and, further, *held* that, until an assessment should be made by the board or the court, the trustees were not entitled to and could not collect anything from the stockholders upon account of their liabilities; the decree of the court then made the assessment of thirty dollars per share upon, and payable by, all the several stockholders or persons who, under the laws of Virginia, are liable as stockholders; that decree, further, removed the trustees who had been named in the deed, and appointed this plaintiff in error to be the sole trustee under the deed for the benefit of creditors, with a direction to him to proceed against all the several individual stockholders, or persons liable as such, wheresoever found, to collect the amount of such assessment upon the shares on which they were severally liable under the laws of Virginia. By the decree of the Circuit Court of Henrico County, after the removal of the suit to that court, a further assessment was made by the court of the remaining fifty dollars per share not theretofore called for, and the plaintiff in error, as trustee as aforesaid, was directed to proceed to collect that assessment also from the persons severally liable as stockholders (fols. 109, 110).

The defendants in this action were sued not as subscribers for stock of the company, but as assignees and transferees of 490 shares; and the action was to enforce

their liability as such assignees and transferees under the laws of Virginia (fols. 7, 8).

The defendants Garth and Harrison are citizens of New York, but, because Lancaster is a citizen of Virginia, and the National Express and Transportation Company (plaintiff's assignor) is a corporation of that same State, in commencing the action in New York, where Garth and Harrison could be served with process, it was impossible to sue in the Circuit Court of the United States (though plaintiff is a citizen of Maryland), and resort was necessarily had to the State court.

Upon the trial, the plaintiff proved in evidence the partnership of defendants (fols. 40–46), the incorporation and organization of the National Express and Transportation Company under the laws of Virginia (fols. 46–52); the deed of trust made by the Company, September 20, 1866, to trustees for the benefit of creditors (fols. 52–54); the various statutes of that State on which he relies for recovery (fols. 56–66, though only some of those statutes appear in the printed record, the others being referred to at the General Term and in the Court of Appeals, under the stipulation at fol. 155); the judicial proceedings in the courts of Virginia which form the basis of his right to recover (fols. 66–111), the fact (admitted in the several answers) without qualification (fols. 16, 28 and 38), that the defendants, in the month of May, 1866, caused to be purchased in Baltimore the 490 shares of stock in the complaint mentioned; the fact that the purchase was made in the firm name of defendants (fols. 113, 121, 123); the fact that defendants paid for the shares (fol. 124) and received new certificates representing them, which were made out in that firm name and issued by the Company to the defendants in July, 1866—certificates representing 355 shares having been so issued July 12, and a certificate representing the other 135 shares having been so issued, July 26 (fols. 114, 127,

129–136); the facts that defendants held those certificates until August 10, 1866, and then sold the shares, endorsed the certificates with their firm name for transfer to the purchasers, and applied the proceeds of the sale to defendant's own use (fols. 129–136, 112–127, and Exhibit K, fols. 128, 129). Plaintiff also proved in evidence the order of injunction granted in October, 1866, which suspended until April 2, 1886 (when it was dissolved), the running of the New York Statute of Limitations (fols. 137–149), and then had a computation made, which showed that, after allowing defendants certain deductions and credits they claimed, the amount of the recovery to which plaintiff was entitled at the time of the trial was $30,641.50 (fols. 151–153). The only evidence offered by defendants at the trial was the testimony of defendant Garth that the defendants were acting in the matter, as brokers, for a customer named Ficklin, for whom the firm was "carrying" the stock on a margin (fol. 131); that the firm did not intend to become stockholders; that, before the time of the trial, all the books and papers of the firm had been lost or destroyed (fol. 130); that he (Garth) supposed at the time of the trial (nearly 24 years after the transactions) Ficklin must have directed the stock to be purchased for defendants (fols. 132, 133), and that, when he (Garth) ascertained the fact of the transfer to the firm name, he expressed to the clerks in his own office indignation that it had been done (fol. 134), and endorsed the certificates for transfer and forwarded them to McKim & Co. (the brokers in Baltimore who had purchased 355 of the shares for defendants, and had rendered defendants an account for the purchases, which defendants paid) with directions to sell the shares and have them transferred from the name of defendants (fol. 135). Defendants then offered in evidence a tabular statement showing credits to which they claimed to be entitled on account of the assessments on

the stock (fols. 136, 151-153). The evidence is set forth, more in detail, in Point IV. here following. On the evidence at the trial, the trial court directed a verdict (fol. 153) for plaintiff against these defendants in error for $30,641.50, but, on motion of defendants' counsel, ordered their exceptions to be heard in the first instance at the General Term, and that judgment be suspended in the meantime (fol. 154). At the General Term defendants moved on their exceptions for a new trial (fol. 155); the Court *held* (fol. 158) that defendants in error never became stockholders or liable as stockholders of the National Express and Transportation Co., and so made an order sustaining the exceptions, setting aside the verdict and granting a new trial (fol. 156); from that order the plaintiff in error appealed to the Court of Appeals, giving the stipulation by the New York statute in such case exacted, that, if the order granting a new trial should be affirmed, there should be judgment absolute against him (fol. 157). The Court of Appeals *held*, also, that the defendant in error, never became stockholders or liable as stockholders of the Virginia corporation (fols. 167-171, 172-177), and affirmed the order appealed from, with judgment absolute against the right of this plaintiff in error—sending down its remittitur and the record to the Supreme Court, with directions to enter such judgment and to proceed according to law (fols. 162, 163). Upon the remittitur that day filed, the Supreme Court, at Special Term, entered an order May 7, 1892, that the judgment of the Court of Appeals be made the judgment of the Supreme Court, with costs to be adjusted, and that defendants in error have execution (fol. 163); the costs were adjusted, and judgment was entered May 10, 1892, as so ordered, directing executions issued (fol. 164). Prior, however, to the filing of the remittitur in the Supreme Court, and so before the judgment there had been entered, a motion

was made in the Court of Appeals for a reargument of the appeal, which was refused in due course; and on the remittitur sent down to the Supreme Court an order of that Court was entered June 29, 1892, denying the motion with costs to defendants in error (fol. 165).

The writ of error from this Court to the Supreme Court of the State of New York was then applied for by the plaintiff, and allowed by the Judge who also signed the citation (fols. 2–4). The writ was served by filing it, with the security taken, the petition for the writ, and the assignment of errors, in the office of the Clerk of the Court to which it is directed, August 26, 1892, within sixty days after entry of the order denying the motion for reargument of the appeal, and so within time to be effective as a supersedeas. The citation was duly served (fols. 1–3).

POINT I.

There was no stipulation or consent in either of the Courts below, by the plaintiff in error, that he would abide by the judgment of the Court of Appeals, or by the judgment of the Supreme Court of the State of New York, or that he would forego the right secured to him under the Constitution of the United States and the Acts of Congress to remove into this Court, upon writ of error, the judgment now complained of, and which is sought to be here reviewed; that judgment was not by his own procurement, in any sense which estops the plaintiff in error in suing out

the writ of error, or in submitting the federal question raised by the adjudication in the State Courts to be reviewed by this Court.

The stipulation referred to in the brief for defendants in error on this motion is found at folio 157 of the printed record, in the notice of appeal by the plaintiff in error to the Court of Appeals from the order of the Supreme Court of New York, made at General Term of that Court, which set aside the verdict directed by the trial Court in favor of the plaintiff and against the three defendants who are here defendants in error, *and granted a new trial.* That stipulation is in these words: "You will please take notice, further, that the appel- " lant assents, and it is hereby assented on the part of " the appellant, that, if the order appealed from is af- " firmed, judgment absolute shall be rendered against " the appellant,"—which is a thing very different from a stipulation *to abide by* that judgment absolute.

The stipulation actually given was given because of the exaction of the New York statute, in Section 191 of the Code of Civil Procedure, prescribing the limitations and conditions of the jurisdiction of the Court of Appeals, which enacts that: "An appeal cannot be " taken, from an order granting a new trial, on a case " or exceptions, unless the notice of appeal contains an " assent, on the part of the appellant, that if the order " is affirmed, judgment absolute shall be rendered " against the appellant"—which is followed by the provision of that Code in these words: "Section 194. " The judgment or order of the Court of Appeals must " be remitted to the court below, to be enforced accord- " ing to law. Upon an appeal from an order granting " a new trial, on a case or exceptions, if the Court of " Appeals determines that no error was committed in " granting the new trial, it must render judgment abso- " lute upon the right of the appellant; and after its

" judgment has been remitted to the court below, an " assessment of damages, or any other proceeding, " requisite to render the judgment effectual, may be " had in the latter court."

The consent so exacted by the New York statute, and which was given in the case at bar, is merely a consent that (whereas the appeal referred to in the notice where such consent is found *is an appeal from an order granting a new trial*, and a mere affirmance by the Court of Appeals of that order would still leave the appellant the right to take his new trial, and, in the event that the new trial should be unsatisfactory to him, the further right to appeal again to the General Term, and thence to the Court of Appeals a second time) *there shall be no new trial, but the issues shall be determined, so far as the Court of Appeals or any other Court of New York can determine them, as if the appeal were from a judgment*, in which latter case the determination of the Court of Appeals--that the judgment appealed from should be affirmed--would be a judgment absolute.

If the determination of the Court of Appeals had resulted in anything else than a judgment absolute (and final, so far as the courts of New York can make it final), the plaintiff could not have had his writ of error under Section 709, Revised Statutes of the United States—and the stipulation for judgment absolute was the necessary preliminary to bring the case here upon a writ of error from this Court—there could have been no writ of error without it. It is well settled that, as the brief for defendants in error remarks, with unnecessary citation of a number of cases decided here, an order of a State Court merely granting a new trial, or merely affirming an order granting a new trial, cannot be brought here upon a writ of error for review by this Court. It is only a judgment absolute and final, in the highest Court of a State in which a decision in

the suit can be had, that is provided for by Section 709 of the Revised Statutes.

Roberts vs. Baumgarten, 126 New York R., 340, which is quoted at length upon the brief for defendants in error, does not decide anything to the contrary of, but confirms, what I have said as to the significance to be attributed to the provisions I have quoted from Sections 191 and 194 of the Code of Civil Procedure, and to the stipulation actually given in the case at bar. That case *(Roberts vs. Baumgarten)* was an action of *ejectment*, and the Court of Appeals, explaining at page 340 the provisions of Sections 1524 and 1525 of the New York Code of Civil Procedure, which are only modifications of the old Revised Statutes of that State and provide for a second and a third trial of the issue in such an action, after a first final judgment rendered *upon questions of fact*, said: "This exception to the "general practice was based upon the peculiar impor- "tance which the common law attached to actions "involving the title to real estate, and its reluctance to "take land from the party in possession, until after the "facts upon which the claim of title was based, where "they were disputed, had been passed upon by two "juries or other triers of questions of fact." Roberts had had one trial where he had judgment, but on appeal to the General Term that judgment had been reversed and a new trial ordered; from that order he appealed to the Court of Appeals, giving the same stipulation as was given in the case now at bar; the order was affirmed, with directions for judgment absolute against plaintiff, which was duly rendered upon the remittitur and entered by the trial Court. Roberts then applied, under Section 1525 of the Code, to the trial Court for an order vacating the judgment and granting him a new trial, and the application was allowed; but, on appeal from that order to the Court of Appeals, it was there *held* that—*the only question being whether, under the law of New York, the plaintiff was entitled to a new trial in*

a Court of that State—after having himself appealed to the Court of last resort of the State from an order *granting a new trial*, and *after* having given a stipulation in his notice of appeal *that (in effect) he should not have a new trial—after* the Court of Appeals had directed judgment absolute against him—*and after* that judgment had been actually entered—*Sections 191 and 194* (hereabove quoted) *of the Code apply to actions of ejectment*, as well as to other actions; and that a judgment absolute on the remittitur in that case was a final determination of the issues, the provisions of Section 1525 notwithstanding. The question was one arising under the New York statute, and the adjudication relates only to proceedings in the New York courts.

The opinion of a Court must always be read in connection with the facts upon which it is based; and, if there is in the opinion in *Roberts vs. Baumgarten* anything more then is here shown with regard to it, all that is there, beyond this, must be regarded as not in judgment. If there had been a Federal question involved and decided in that case, what was said by the New York Court, interpreting the statute of that State, would not have been allowed to deprive this Court of jurisdiction upon a writ of error.

But, if the provision of the New York statute here in question (Section 191, Code Civil Procedure, Subdiv. 1) is to be construed as a prohibition against a resort to this Court, it is, in just so far, *unconstitutional, and, therefore, void*—and the stipulation given in the case now at bar, because of the exaction of that statute, is to be treated here as of no effect to deprive this Court of jurisdiction upon the writ of error now moved to be dismissed, or to take away the right of this plaintiff in error, under § 709 of the Revised Statutes of the United States, to review the judgment of the State Court complained of.

In *Insurance Co. vs. Morse*, 20 Wall., 450. A corporation of another State, having no right to transact

business in the State of Wisconsin without the consent, express or implied, of the latter State, was required by a statute of Wisconsin, in consideration of the consent of the State, allowing it to transact business there, to appoint an attorney in the State "on whom process of "law can be served" (the appointment to be by an instrument), "containing an agreement that such com- "pany will not remove the suit for trial into the "United States Circuit Court or Federal Courts." The plaintiff in error, a corporation and citizen of New York, had, upon the consideration mentioned, entered into the agreement, and was carrying on business in Wisconsin when it took the steps by the Act of Congress prescribed for removal to the Federal Court of an action commenced against it in a State Court; the State Court disregarded the attempted removal, proceeded to trial and entered a judgment which was affirmed on appeal to the State Court of last resort; from that affirmance the question was brought by writ of error to this Court, where counsel for the defendant in error insisted, as does the brief in support of the motion now at bar, that "a party cannot be allowed to take bene- "fits and at the same time repudiate obligations; the "Legislature of Wisconsin was granting a favor; it "could impose its own conditions, it matters not how "much these conditions might conflict with the legal "or constitutional rights of" the party availing of that favor and entering into the statutory agreement required as a condition precedent to enjoyment of the consideration the State gave for it. But this Court *held* that, "*upon whatever consideration* * * * there "is no sound principle upon which such agreements "can be specifically enforced. * * * Every citizen "is entitled to resort to all the courts of the country, "and to invoke the protection which all the laws or "all those courts may afford him. * * * He may "omit to exercise his right to remove his suit to a

" Federal tribunal as often as he sees fit in each re-
" curring case. * * * He cannot, however, bind
" himself in advance by an agreement, which may be
" specifically enforced, to forfeit that right. * * *
" that the agreement of the insurance company is
" invalid upon the principles mentioned, numerous
" cases may be cited to prove [citing a number of
" them]. They show that agreements in advance to
" oust the Courts of the jurisdiction conferred by law
" are illegal and void." Quoting the case from 54 Maine R., 70, the opinion continues: " 'The law and
" 'not the contract prescribes the remedy, and the par-
" 'ties have no more right to enter into stipulations
" 'against a resort to the Courts for their remedy in a
" 'given case, than they have to provide a remedy pro-
" 'hibited by law; such stipulations are repugnant to
" 'the rest of the contract, and assume to divest Courts
" 'of their established jurisdiction; as conditions prece-
" 'dent to an appeal to the courts, they are void.'
" Many cases are cited in support of the rule thus
" laid down. Upon its merits, this agreement cannot
" be sustained." And, quoting Article 3, Sec. 2, of the Constitution, it is added: "The jurisdiction of the
" Federal Courts, under this clause of the Constitution,
" depends upon and is regulated by the laws of the
" United States. State legislation cannot confer juris-
" diction upon the Federal Courts, nor can it limit or
" restrict the authority given by Congress in pursu-
" ance of the Constitution. This has been held many
" times."

In the case cited in that opinion from 6 Gray, 174, the Court (SHAW, C. J.) after suggesting various stipulations (in case of breach, no action to be brought, &c., &c.) says: "Although, in a certain sense, these are
" rights or privileges which the party, in the proper
" time and place, may give or waive, yet a compliance
" with them cannot be annexed to the contract, cannot

"be taken notice of and enforced by the court or "tribunal before which the remedy is sought."

Even an actual arbitration, under an agreement to arbitrate, does not preclude a resort to the courts in a proper case—the proceedings and award of arbitrators may be reviewed by the courts in many cases.

In *Doyle vs. Continental Ins. Co.*, 94 U. S., 538, this Court, discussing *Insurance Co. vs. Morse*, said it had carefully reviewed that decision, and was satisfied with it; continuing: "It was held, first, upon the "general principles of law, that although an individual "may lawfully omit to exercise his right to transfer a "particular case from the State courts to the Federal "courts, and may do this as often as he thinks fit in "each recurring case, he cannot bind himself in ad-"vance by an agreement which may be specifically en-"forced, thus to forfeit his rights. This was upon the "principle that every man is entitled to resort to all the "courts of the country, to invoke the protection which "all the laws and all the courts may afford him, and "that he cannot barter away his life, his freedom or his "constitutional rights."

See also *Kern vs. Huidekoper*, 103 U. S., 492.

In this connection, the case of *Board of Commissioners of Tippecanoe County vs. Lucas, Treasurer*, 93 U. S., 108, 113, is directly in point and very instructive. It came here from Indiana, and was brought on to be heard in regular order. Mr. Justice FIELD, after a statement of the case, delivered the opinion of the Court as follows: "It is objected, *in limine*, that this Court "has no jurisdiction of the cause, on the alleged ground "that the judgment rendered is not a final judgment. "The order of the Circuit Court, granting a preliminary "injunction, was, it is true, interlocutory, and, if the "judgment of the Supreme Court of the State had "been limited to a simple reversal, the objection "would have been tenable. The cause would then have

" remained in the Circuit Court for further proceed-
" ings. But the direction to that court, accompanying
" the reversal of its order, to dismiss the complaint,
" made a final disposition of the cause. With
" the entry of that judgment the cause was at an end.
" With the peculiarities of the practice of the Indiana
" courts we have nothing to do. If, upon an appeal
" from an interlocutory order, a final disposition of the
" merits of a cause can be made in that State, it is no
" concern of ours. If, by any direction, the entire
" cause is, in fact, determined, the decision, when re-
" duced to form and entered in the records of the court,
" constitutes a final judgment, subject, in a proper
" case, to our review, whatever may be its technical
" designation. The course adopted in this case was
" evidently pursued, from the fact that the whole
" merits of the controversy had been considered on
" the motion for the preliminary injunction. The ap-
" plication was founded upon the alleged invalidity of
" the Act of 1872; no other matter was discussed, and
" all objections of form in the proceeding were waived
" that the validity of the act might be considered and
" determined. Being determined against the view
" advanced by the plaintiffs, the cause, so far as the
" State Courts were concerned, was practically at an
" end."

In that case, the law of Indiana *authorized or required the State court of last resort to enter judgment absolute on determination of the appeal from the interlocutory order granting the injunction;* not only had there had been no judgment below, there had been no trial, and not even an answer by the defendant. The power exercised by that court was like that given to the New York Court of Appeals by Section 194 of the Code, above quoted. And if the defendant, by appealing to the Indiana court of last resort from an interlocutory order, enabled that court, in the exercise of the authority conferred upon it by the law of the

State, to render and enter an absolute and final judgment against him, upon affirmance of the order appealed from, and without more, *he, in effect and necessarily, by merely serving the notice of appeal from the order, consented to judgment absolute against him if the order appealed from should be affirmed.*

But, when the point now pressed was raised here in that case, this Court held that it had jurisdiction upon the writ, and proceeded to judgment of reversal of the State court.

There are many cases in the books where writs of error have issued from this court to bring up the judgments of New York courts for review here, and where jurisdiction has been exercised—though the record showed the same stipulation by the plaintiff in error, in his notice of appeal to the Court of Appeals, as is commented upon in the present case.

Hoyt vs. Sheldon, 1 Black 587, is an example, where that fact appears in the report.

There is therefore no merit or force in the ground of notice stated in what is styled the "preliminary" point of the brief filed for defendants in error in support of the motion to dismiss.

POINT II.

This Court has jurisdiction upon the writ of error to review the judgment of the State Court here complained of. The federal question is clear, and the denial of the plaintiff's right under the Constitution of the United States is manifest. The plaintiff in error claimed under public acts and judicial proceedings of the State of Virginia. The refusal of the Courts of the State of New York to give to those acts full faith and credit, and to give to those judicial proceedings the same effect in their operation upon the title of this plaintiff in error to recover from these defendants in error, as they have by law and usage in the State of Virginia itself (which is the full faith and credit required by the Constitution), constitutes a proper case for review in this Court under Sections 709 and 905 of the Revised Statutes of the United States.

The courts of New York necessarily, and (as the opinions in the record, at pp. 152–162, 167–171, and 172–177 show) in fact, decided *what* effect the appearance upon the books of the National Express and Transportation Company of the names of these defendants in error, as stockholders of record, had under the public acts and the judicial proceedings of the State of Virginia, under which the plaintiff in error claimed in the action; and, as those courts decided against *the* effect the plaintiff in error claimed for those acts and judicial proceedings of Virginia, this Court, under the clause of the Constitution referred to in the assignment of errors (fols. 177–180) and the provision of Section 905 of the Revised Statutes of the United

States prescribing the effect of those proceedings, has jurisdiction, upon the writ of error, to review the judgment complained of.

It was because of the underlying provision of the Constitution of the United States referred to in the assignment of errors that the plaintiff asked the New York court for the judgment he is entitled to under the laws and judicial proceedings of the State of Virginia. The precise matter adjudicated by the courts of the State of New York is not all set forth in terms in the recitals of the remittitur (fol. 162) sent down from the Court of Appeals, or in the recitals of the formal judgment thereupon entered by and in the Supreme Court of New York (fols. 163, 164); the remittitur merely directs judgment absolute for defendants and against plaintiff—the usual form in such cases; the order of the Supreme Court at Special Term (fol. 163), made on that remittitur is (in the usual form) that the judgment of the Court of Appeals be made the judgment of the Supreme Court; and the judgment entered (in the usual form) on that order in the Supreme Court (fol. 164) is in almost the terms of the order and of the remittitur, with the costs adjusted, and a direction for execution. But the judgment absolute demanded against plaintiff by the separate answers of the several defendants (fols. 26, 38) is that the complaint be dismissed with costs; and that is, in effect, the judgment they were entitled to and got under the remittitur. Such judgment is based upon one single determination of the Court of Appeals, as well as of the Supreme Court at General Term before the case was taken to the Court of Appeals, as shown in the several opinions in the record (fols. 158–162, 167–171, 172–177); there was only one question discussed or considered either at General Term or in the Court of Appeals, only one thing decided—*that the defendants never became stockholders or liable as stock-*

holders of the National Express and Transportation Company.

The brief filed by defendants in error in support of this motion contains repeated statements that such was the question, the only question, adjudicated below; on page 16, for example, that brief recites that the Court of Appeals "predicated its decision wholly upon the "'primary fact', namely, that, upon the undisputed "evidence, the defendants are not and never were "stockholders in the corporation represented by the "plaintiff." And, on the same page, that Brief states: "The General Term said (Record, p. 158): 'A great "'many important questions are presented by this "'appeal, but, in the view which we take of the "'*primary fact*, it will not be necessary to consider "'them. Upon a careful review of all the evidence "'adduced upon the trial, we are of opinion that the "'defendants never became stockholders of the cor-"'poration represented by the plaintiff, and conse-"'quently are not responsible for the unpaid assess-"'ments sought to be recovered in this action.'"

There is, therefore, no contention in this Court as to what was the question adjudicated in the State courts by the judgment to be here reviewed; and, if there were any dispute between the parties now as to what was the determination below, a reference to the duly authenticated opinions in the record speedily decides it.

Since the amendment made in 1867 to the Judiciary Act, and now embodied in Section 709 of the Revised Statutes, this Court refers to the opinions below, which are in the record and are authenticated as are the opinions in this record (fols. 166, 171), to ascertain, in connection with the rest of the record, what was the precise determination in the State Court—and the books have many cases of such resort to the opinions of the Court of Appeals in cases brought here upon writs of error to courts of New York to review judgments entered in the form of the judgment in the case

now at bar—merely making the judgment of the Court of Appeals the judgment of the court entering judgment on the remittitur, and not setting forth in terms the particulars adjudicated.

Murdock vs. Memphis, 20 Wall., 590.
Gross vs. U. S. Mortgage Co., 108 U. S., 477.
Adams County vs. Burlington R. R. Co., 112 U. S., 129.
Phil. Fire Ins. Co. vs. New York, 119 U. S., 116.
Walter A. Wood Co. vs. Skinner, 139 U. S., 295.
Dale Tile Manfg. Co. vs. Hyatt, 125 U. S., 46.

There is no other ground shown by the record on which the decision of the case was correct, or could here be treated as correct. Before the trial occurred in 1890, various alleged defenses in the answers (served in 1887) had been disposed of by adjudications in this Court, and in other courts throughout the country, in other cases wherein this plaintiff in error was plaintiff, and persons other than these defendants, stockholders in the National Express and Transportation Company, were defendants; and so, on the trial of this case, all those attempted defenses were abandoned; the defendants offered no evidence to support either of them. Even the defense of the New York Statute of Limitations—by allegation that the causes of action alleged in the complaint did not accrue within six years before the action was commenced—was not below, and is not here, urged or relied upon by counsel for defendants in error; and, if it had been or were now urged or relied upon, no benefit could have come, or could now come, to defendants from that attempt at a defense. The causes of action are upon two decrees of Virginia courts making assessments upon the stockholders of the Virginia corporation in question—one assessment made December 14, 1880 (fols. 10–12), the other March 26, 1886 (fols. 12, 13). Six years had not elapsed since

the first of those assessments, and before this action was commenced in 1886 (fols. 6, 7). It has been decided not only by the Courts of Virginia, but by this Court, that the Statute of Limitations did not begin to run in favor of stockholders of the corporation in question until the assessments had been made by the the Virginia Court (*Hawkins vs. Glenn*, 131 U. S., 319; *Glenn vs. Liggett*, 135 U. S., 533; *Lewis vs. Glenn*, 84 Virginia R., 947; *Vanderwerken vs. Glenn*, 85 Virginia R., 9; and see *Williams vs. Taylor*, 120 New York R., 244)—and by proof on the trial (fols. 137–149) of the injunction in the stockholders' suit in the Supreme Court of the State of New York, granted October, 1866 (fol. 140), and not dissolved until April, 1886 (fols. 147–149), that defense was effectively disposed of, anyhow. Under Section 406 of the New York Code of Civil Procedure (merely a re-enactment of Section 105 of the Code of Procedure which was operative from a date earlier than 1866), the injunction suspended the running of the Statute of Limitations (*Sands vs. Campbell*, 31 New York R., 345; *Berrien vs. Wright*, 26 Barbour R., 208; *McQueen vs. Babcock*, 41 Barbour R., 337; *Hubbell vs. Medbury*, 53 New York R., 98; *Fincke vs. Funke*, 25 Hun R., 616; *Van Wagoner vs. Terpenning*, 46 Hun R., 425; *Wilkinson vs. First Nat. Fire Ins. Co.*, 72 New York R., 499).

The only other defense set up by the answers, and which need be considered here, is that alleged with reference to what is called the compromise decree of July 21, 1883 (fol. 99). But the defendants in error were not released from their liabilities as stockholders who did not avail of that decree, because of the compromises made with other stockholders who did avail of it. By consent of the creditors, the opportunity was offered by the Virginia Court by that decree to all stockholders to settle promptly at less than the full amount of their liability. A few of the stockholders improved that opportunity; and, the time during which the decree was

made operative having expired, it was vacated by an order of the Court made December 9, 1884 (fols. 101, 102), which instructed this plaintiff in error to proceed as if the decree had never been entered. It was by the decree of March 26, 1886 (fols. 109, 110), that the final assessment was made on the stockholders set forth in the second cause of action in this case, and the plaintiff in error was directed by the Virginia court to collect it. Upon a direct attack in the court itself which made that decree, and by appeal thence, the validity of that and of all the prior proceedings was affirmed by the Supreme Court of Appeals of Virginia (*Hamilton vs. Glenn*, 85 Virginia R., 901; *Hawkins vs. Glenn*, 131 U. S., 330, 331). In the latter case this Court said at page 332: "The court may "have erred in its conclusions, but its decree cannot "be attacked collaterally; and, indeed, upon a direct "attack it has already been sustained by the Virginia "Court of Appeals." The question raised by the answer with reference to the "compromise decree" has thus been conclusively decided against the contention of defendants in error in this collateral action; and nothing in the record with regard to that decree or that defense can be found to support the judgment of the New York courts here complained of.

But the determination of the question, which was actually decided in the State court of New York by the judgment here complained of—the only question adjudicated, discussed or considered by the General Term or the Court of Appeals—(*that the defendants never became stockholders or liable as stockholders of the National Express and Transportation Company, a corporation of the State of Virginia*)—necessarily depends upon the statutes of the State of Virginia regulating such matters, and upon those statutes only—and so, the federal question is presented necessarily and glaringly upon a mere inspection or statement of the judgment in the State court of New York.

Counsel for defendants, however, in their brief in support of this motion, set forth, as a ground for dismissal of the writ, the allegation that "nowhere in the "complaint or record does it appear that the plaintiff "claimed any 'right, title, privilege or immunity' "against the defendants under the Constitution or "laws of the United States;" and that no such recital of claim is shown by the summarized statement of the argument in the Court of Appeals (appearing in the official report of the case in 133 New York R., 20) to have been set forth in the briefs used in that Court.

But the jurisdiction of this Court does not depend upon any recital in the record showing that, in the pleadings or during the trial of the issues, the clause of the Constitution of the United States ordaining that "full faith and credit shall be given in each State to "the public acts, records and judicial proceedings of "every other State," or Section 905 of the Revised Statutes of the United States prescribing the *effect* of the judicial proceedings of the State of Virginia in their operation upon the title of the plaintiff in error to recover from the defendants in error, was in terms set forth in the court below. The pleadings, the proceedings at the trial, and the opinions of the State courts, all in the record, show clearly that it was upon that clause of the Constitution and that section of the Revised Statutes the plaintiff in error relied for his right to recover at all, in the action in the courts of New York; the plaintiff would not otherwise have alleged in the complaint that the action was commenced to enforce a liability of the defendants under the laws of Virgina as stockholders of the National Express and Transportation Company, a corporation of that State, and would not have proved those laws in evidence on the trial, or alleged in the complaint the proceedings in the courts of Virginia, which are set forth in the complaint, and which were proved on the trial as the

basis of the plaintiff's right of recovery against these defendants.

In *Murray vs. Charleston*, 6 Otto, 432, it was objected that this Court had no jurisdiction, because, it was said, no Federal question was raised of record or decided in the State court. Mr. Justice STRONG delivered the opinion here: "In questions relating to "our jurisdiction, undue importance is often attributed "to the inquiry whether the pleadings in the State "court expressly assert a right under the Federal Con- "stitution. The true test is not whether the record "exhibits an express statement that a Federal question "was presented, but whether such a question was "decided, and decided adversely to the Federal right. "Everywhere in our decisions it has been held that we "may review the judgments of a State court when the "determination or judgment of that court could not "have been given without deciding upon a right or "authority claimed to exist under the Constitution, laws "or treaties of the United States, and deciding against "that right. Very little importance has been attached "to the inquiry whether the Federal question was "formally raised. In *Crowell vs. Randell* (10 Pet. 368) "it was laid down, after a review of almost all our "previous decisions, 'that it is not necessary the ques- "'tion should appear on the record to have been raised, "'and the decision made in direct and positive terms, "'*in ipsissimis verbis*; but that it is sufficient if it "'appears by clear and necessary intendment that the "'question must have been raised, and must have been "'decided, in order to have induced the judgment.' "This case was followed by *Armstrong et al. vs. The "Treasurer of Athens County* (16 *Id.*, 281), where it "was held sufficient to give this Court jurisdiction if it "appears from the record of the State court that "the Federal question was necessarily involved in the "decision, and that the court could not have given the "judgment or decree which they passed without decid-

" ing it. See also *Bridge Proprietors vs. The Hoboken*
" *Company*, 1 Wall., 116, and *Furman vs. Nichol*, 8 *Id.*,
" 44."

Mr. Justice MILLER, delivering the opinion of this Court in *The Bridge Proprietors vs. The Hoboken Coal Co.*, 1 Wall., 116, 142, said : " It is objected, however, " by the defendants, that the pleadings do not, in " words, say that the statute is void because it con- " flicts with the Constitution of the United States, and " do not point out the special clause of the Constitu- " tion supposed to render the act invalid. It would be a " new rule of pleading, and one altogether superfluous, " to require a party to set out specifically the provision " of the Constitution of the United States on which he " relies for the action of the court in the protection of " his rights. If the courts of this country, and espe- " cially this Court, can be supposed to take judicial " notice of anything without pleading it specially, it is " the Constitution of the United States. And if the " plaintiff and defendant, in their pleadings, make a " case which necessarily comes, within the provisions of " that instrument, this Court surely can recognize the " fact without requiring the pleader to say in words : " ' This paragraph of the Constitution is the one in- " ' volved in this case.' "

In *Furman vs. Nichol*, 8 Wall., 44, Mr. Justice DAVIS, delivering the opinion of this Court, said : " It is " urged that the particular provision of the Constitu- " tion which the plaintiffs in error say has been vio- " lated in application to their case should be contained " in the pleadings ; but this is in no case necessary. " If the record shows, either by express averment or " by clear and necessary intendment, that the consti- " tutional provision did arise, and that the Court below " could not have reached the conclusion and judgment " it did reach without applying it to the case in hand, " then the jurisdiction of the Court attaches."

When *Green vs. Van Buskirk* (quoted elsewhere in

this brief, for the point decided the first time the case was here) came the second time before this Court, it was upon a motion to dismiss the writ for an alleged want of jurisdiction, on the ground that the record there under review did not show that the construction of any clause of the Constitution was drawn in question by the plaintiff in error in the State court, or that any right was claimed under any such clause, or that any decision was made denying any such right. The clause of the Constitution relied on for the Federal question in that case was the one we rely on here, as to which, this Court there said, that, if that article of the Constitution was not expressly designed for such cases, it finds in them occasions for its most beneficent operation. The contention of defendant in error was that the question decided by the New York court in the judgment then sought to be reviewed was a question arising, not under the law of Illinois (under which plaintiff in error claimed), but under the law of New York—just as the brief for defendants in error on the present motion assumes to assert that the question decided by the New York court, in the case now at bar, was a question arising, not under the laws of Virginia, but under the common law. But this Court *held* the controversy was to be decided by the effect given by laws of Illinois, where the property was situated, to the proceedings of the courts of that State, under which the property was sold ; that *that* question was necessarily decided by the New York courts ; that it was decided against the claim set up by the plaintiff in error under the constitutional provision and the Illinois statute referred to, and that the case was, therefore, properly here for review.

Green vs. Van Buskirk, 5 Wall., 307.

As was said in *Crapo vs. Kelly*, discussing that ruling in *Green vs. Van Buskirk:* "Without reference "to whether he was right or wrong, the fact that

" Green claimed under the judicial record of Illinois, " and that his claim was overruled, was held to give " this Court jurisdiction "—and the same was the ruling in *Crapo's case* itself, where it was said: " With- " out reference to whether Crapo was right or wrong, " whether the question was *res integra* or *res adjudi-* " *cata*, the fact that he claimed title under the Massa- " chusetts record, and that his claim was overruled, " gives this Court jurisdiction of the present case "— on the ground that the New York court had neceessarily decided against the claim made under the law of Massachusetts, and because the New York Court of Appeals did not give the proceedings there in question the same effect as they have by law and usage in the courts of the State where the statute assignment was executed by the Judge of the Court of Insolvency—and for that reason the judgment was reversed.

Crapo vs. Kelly, 16 Wall., 621.

The third and last time *Green vs. Van Buskirk* came before this Court it was disposed of upon the merits, and this Court said the controversy had been already substantially decided by the denial of the motion to dismiss, adding: " The question raised on the motion " to dismiss was whether the Supreme Court of New " York, in this case, had decided against a right which " Green claimed under the Constitution and an Act of " Congress. If it had, then this Court had jurisdiction " to entertain the writ of error; otherwise, not. It was " insisted on the one side, and denied on the other, " that the faith and credit which the judicial proceed- " ings in the courts of Illinois had by law and usage in " that State were denied to them by the Su- " preme Court of New York in the decision which " was rendered. Whether this was so or not " could only be properly considered when the " case came on to be heard on its merits; but this " Court, in denial of the motion to dismiss, *held* that

" the Supreme Court of New York necessarily decided
" *what* effect the attachment proceedings in Illinois had
" by the law and usage of that State, and, as it
" decided against *the* effect which Green claimed for
" them, this Court had jurisdiction under the clause of
" the Constitution which declares that ' full faith and
" ' credit shall be given in each State to the public
" ' acts, records and judicial proceedings in every other
" ' State,' and the Act of Congress of 1790 (Revised
" Statutes, Sect. 905), which gives to those proceedings
" the same faith and credit in other States that
" they have in the State in which they were ren-
" dered."

Green vs. Van Buskirk, 7 Wall., 145.

And *that* is the rule for which we contend in the case at bar. Under that rule, this Court is shown to have jurisdiction of this case upon the writ of error.

POINT III.

The writ of error was properly directed and allowed. The fact that it was allowed by the Judge of the Court to which the writ was directed affords no ground for dismissal of the writ by this Court.

The Act of Congress does not in terms prescribe to what court the writ of error shall be addressed. But it has been repeatedly *held* by this Court that the writ should be directed to the court in which the final judgment was rendered, by whose process it is to be executed, and where the record remains, although a higher court has considered the case upon appeal or writ of

error, and has sent down a remittitur or rescript accordingly.

Gelston vs. Hoyt, 3 Wheat., 246.
Webster vs. Reid, 11 How., 457.
Kanouse vs. Martin, 15 How., 198.
McGuire vs. Commonwealth, 3 Wall., 382.
Polleys vs. Black River Imp. Co., 113 U. S., 81.
Atherton vs. Fowler, 91 U. S., 147.

The case last cited explains the practice of this Court in that particular very fully.

Many of the cases in which this Court has so expressly ruled were cases from New York; the books show frequent instances where the writ was addressed to the existing Supreme Court of that State, though the causes had been on appeal from that court to the Court of Appeals, which had decided the questions involved, and had sent down remittiturs to the Supreme Court, with directions to enter judgment and issue execution accordingly. As the New York Court of Appeals never retains the record, but sends it back as part of the remittitur to the trial court, where it remains, a writ of error is (now that the practice has become settled) never sent from this Court to the Court of Appeals.

Green vs. Van Buskirk was passed upon three times by this Court, and each time afforded occasion for a ruling directly in point in the motion now at bar. That case had originated, as did the case now at bar, in the Supreme Court of the State of New York, and, on the trial, judgment was there entered, from which an appeal was taken to the Court of Appeals, where an affirmance was had, whence the remittitur (consisting of the record and the judgment of affirmance) was sent down to the Supreme Court again, with directions to that court to enter and execute judgment accordingly; that court thereupon entered its own judgment (as the same court did in the case now at bar) upon the re-

mittitur, with directions that the plaintiff, the successful party, have execution; the case was thence brought here by writ of error, directed not to the Court of Appeals, but to said the Supreme Court of the State of New York. The writ had been lodged, not in the office of the Clerk of the Court of Appeals, but in the office of the Clerk of the Supreme Court, where the record remained; such lodgment of the writ was within the time to make it operative as a stay of the judgment of the Supreme Court, but not within the time to operate as a stay if that time was to be computed from the date of judgment by the Court of Appeals. The attorneys for the plaintiff below had directed execution to issue from the Supreme Court, notwithstanding; and, to prevent actual issue of execution, this Court was moved for a special order of supersedeas. That motion was opposed by the contention made in the case now at bar—that the judgment complained of was the judgment of the Court of Appeals, and not the judgment of the Supreme Court, and that by lodging the writ with the Clerk of the latter no stay had been effected. But this Court, discussing that writ and the effect of filing it in the office of the Clerk of the court to which it was directed, approved the practice, then long established in cases from Massachusetts and New York, of bringing such a judgment for review here by writ of error addressed, not to the State Court of last resort, but to the State Court of original jurisdiction—saying, by Mr. Chief-Justice CHASE:

"*The true construction of the Act of Congress re-*
"*quires us to hold that a judgment cannot be regarded as*
"*final in the sense of the Act until entered in a court*
"*from which execution can issue. In the case now before*
"*us the record was sent by the Court of Appeals to the*
"*Supreme Court, and the judgment was entered in the*
"*latter Court in conformity with the direction of the*
"*former. This was, it is true, the judgment of the Court*
"*of Appeals, as well as the judgment of the Supreme*

" *Court ; but it became a final judgment on which execu-*
" *tion could issue only when entered, on the 16th of Feb-*
" *ruary, 1866, in the Supreme Court, to which the record*
" *was returned, and where it remained.*"

Green vs. Van Buskirk, 3 Wall., 450.

And, since that decision, there has never been any doubt as to the procedure in cases from New York.

The writ in the case at bar was directed to the Supreme Court, and has brought up the record now printed.

It was properly addressed.

The statute does not in terms prescribe who must allow the writ. Counsel for the motion now at bar, in their brief, proceed upon the erroneous motion that the writ of error is to be treated as the mandate of the Judge who signs the allowance of it ; and seem to suppose that a Judge of the State Court to which the writ is directed, if he allows the writ, thereby arrogates to himself some assumption of individual authority to adjudge that the court of last resort in the State, which sent down the remittitur for judgment and execution, has fallen into error *he* can and will correct. But, in fact and in form, whoever signs the allowance, the writ itself is sent from and out of this Court, as a mandate of the President of the United States, attested by the Chief-Justice of this Court. Such writs to a Circuit Court of the United States need not be allowed by any one, but issue of right and as a matter of course, and, when filed by the party in the office of the Clerk of the Court, are duly served. The purpose of the allowance of the writ to the State Court is not to adjudicate anything, but merely to afford some assurance that a Federal question was decided in the case ; and the practice which has grown up under the decisions of this Court supposes that that question of fact, ordinarily ascertained by reading the petition for the writ, and the assignment of errors—prepared by

counsel for the plaintiff in error—can be satisfactorily passed upon, in the first instance, by a Judge of the court to which the writ is directed—being the same Judge by whom the citation may be signed. The record itself is not ordinarily, if ever, examined when the allowance of the writ is under consideration; the Judge who makes the allowance relies very much, and necessarily, upon the counsel who applies for it and who has prepared the petition and the assignment of errors, and, as security is offered to and taken by the Judge who allows the writ, for the protection of the adverse parties, the allowance is usually determined upon the *prima facie* case thus made by counsel. No Justice of this Court who signs an allowance of a writ of error to a State court ever considers himself committed to support the writ when a motion shall be made on the record for dismissal. Under these circumstances, though it is eminently proper, and it is in the interest always of right, that the practice should reserve to the several Justices of this Court the authority to sign allowances of writs of error, there is ordinarily no reason why either of the overworked Justices of this Court should be bothered by applications in such matters, unless the Judge of the State court, who is also permitted by the practice to allow the writ, refuses, on application, to do so. And it is, to most lawyers, scattered throughout the country and remote from the sittings of this Court or the residences of the Justices, much more convenient to apply in the first instance to the local Judge—not to mention the saving to the client of expenses of travel.

The practice of this Court has, therefore, been liberal always in the matter; and this Court has never been astute to find occasion to support captious objections of the kind now made to the allowance of the writ in the case at bar; substance is regarded here, and details of mere form are considered of little consequence.

The procedure as to allowance of writs of error was stated by Chief-Justice CHASE in *Gleason vs. Florida*, 9 Wall., 783: "No writ of error to a State Court can "issue without allowance, either *by the proper Judge of* "*the State Court* or by a Justice of this Court;" and was more fully discussed by Mr. Justice MILLER in *Bartmeyer vs. Iowa*, 14 Wall., 26, as follows: "The "statute requires that the citation must be signed by "the Chief-Justice, or Judge, or Chancellor of the "court rendering or passing the judgment or decree "complained of, or by a Justice of the Supreme "Court of the United States. It has been the settled "doctrine of this Court that a writ of error to a State "court must be allowed by one of the Judges above "mentioned. * * * The Supreme Court of Iowa, "which rendered the judgment complained of, is com- "posed of a Chief-Justice and three Associate Justices. "We are of opinion that the Act of Congress requires "that, *when there is a Court so composed*, the writ of "error can only be allowed by the Chief-Justice of that "Court, or by a Justice of the Supreme Court of the "United States. In case of a writ to a Court *com-* "*posed of a single Judge* or Chancellor, the writ may be "allowed by that Judge or Chancellor, or by a Justice "of the Supreme Court of the United States."

As, then, the *citation*, if not signed by a Justice of this Court, is required by the statute to be signed *by the Chief-Justice, or Judge, or Chancellor, of the Court rendering or passing the judgment or decree complained of;* and the practice which has grown up under the decisions of this Court requires the writ of error, if not allowed by a Justice of this Court, to be *allowed by the Chief-Justice, or Judge, of the Court rendering or passing the judgment complained of;* and the case of *Green vs. Van Buskirk*, 3 Wall., 450, quoted here above, which follows all the other cases cited before it in this point, expressly holds that—in a case like the one now at bar, originating in the Supreme Court of the State

of New York, going thence to the Court of Appeals, whence, after determination of the appeal, the record is sent down to the Supreme Court again, with the remittitur and a direction to enter judgment accordingly, which is done, and furnishes *the only judgment on which execution can issue*—it is the latter judgment which is complained of, and is to be here reviewed—*and the Supreme Court of New York is therefore the court rendering or passing the judgment complained of;* it follows, logically and necessarily, that there must be *some* Judge of the Supreme Court of New York who is authorized by the practice to allow the writ of error from this Court to bring up the record of that judgment.

The decision in that case was regarded at the time as so narrow and unnecessarily restrictive that three of the Justices of this Court made formal dissent; the decision was made only because of the composition of the Iowa Court, consisting of three Associate Justices and one Chief Justice, and because, as the Act of Congress requires in such a case that the *citation* be signed by the Chief Justice, it was considered by this Court necessary to enforce the rule requiring the writ to be allowed only by a Judge authorized to sign the citation. But the rule in *Bartmeyer vs. Iowa* has not been extended to any case not strictly within its terms. It does not prevent any Justice of the Supreme Court of the State of New York, in a case like this, from allowing a writ of error to that Court. And there is no reported case in which the authority of such a Justice to allow the writ has ever been questioned here.

The writ in this case was actually allowed by one of those Judges, Mr. Justice PATTERSON (fol. 4); he signed the *citation* (fol. 3), describing himself and identifying the judgment complained of in these words: "Witness, "the Honorable EDWARD PATTERSON, one of the Justices "and now the presiding Justice at the Special Term of "said the Supreme Court of the State of New York,

" First Judicial District (the Court by which the judg-
" ment complained of by the plaintiff in error was
" entered and was by order directed to be entered),
" this 24th day of August, in the year one thousand
" eight hundred and ninety-two.

" (Signed) EDW'D PATTERSON,
" Justice Supreme Court, State of New
" York, presiding at Special Term
" this 24th day of August, 1892."

His allowance of the writ was accompanied by a recital as follows: "The foregoing writ is hereby " allowed.

"There is no Chief-Justice or presiding Justice " of the Supreme Court of the State of New York, " though there is a presiding Justice of the General " Term of said Court in each of five judicial depart- " ments. The presiding Justice of the First Depart- " ment, which consists of the City and County of New " York (being coextensive with the First Judicial Dis- " trict), is now absent from the State, and I am the " only Justice of the Court now sitting or assigned to " sit within said First Judicial District. *The judgment " complained of by the plaintiff in error is a judgment " entered by direction of the court, at Special Term, in " the First Judicial District, on a remittitur from the " Court of Appeals.* I am now the Justice presiding at " such Special Term of the Court, to which I have " been regularly assigned, and with all the powers of " such a Justice.

" (Signed) EDWD. PATTERSON,
" Justice Supreme Court of the State of
" New York, Presiding at Special
" Term, this 24 day of August, 1892."

The statement that the presiding Justice of the General Term in the First Department was then absent (which appears to have been suggested by

Butler vs. Gage, 138 U. S., 56), is, perhaps, irrelevant and surplusage; but all the rest of what is there said is certainly relevant. This Court takes judicial notice of the Constitution and legislation and jurisprudence of each of the several States, and is aware that the Supreme Court of the State of New York is one court, though it has numerous justices, sitting ordinarily in the several districts by the electors of which they are elected, but with the power and authority to sit and exercise their functions in other of the districts to which they may be assigned from time to time; there is no Chief-Justice of or in that court, or any one having the authority or precedence of a Chief-Justice of the court; each branch of the court has a presiding Justice, whether the General Term or the Special Term, and a Justice of the Supreme Court presides at Oyer and Terminer or at the Circuit; but each branch of the court has a separate and distinct branch of the business of the court to perform, and as to such business the single Justice presiding at any branch of the court, to which only one Justice is assigned, has and exercises all the authority of the court; a presiding Justice in one branch has no precedence on that account in any other. There are seven Justices in the First Judicial District, who are elected by the electors residing in that District. The General Term in any Department may consist of Four Justices, to be designated by the Governor from the whole number of Justices in the State, without reference to the Districts by which they were severally elected and where they reside; but ordinarily three, only, sit. In the nature of things, where several judges are on the bench at one and the same time, one of them must preside; until the Constitution of the State was amended to read as Art. VI., § 7, now reads, the presiding Justice at a General Term was the senior of those sitting; the amendment does not add to the authority or precedence of a Justice presiding at a General Term before the

amendment was adopted; and a presiding Justice of any General Term has now no authority or precedence, because of that fact, among the other Justices of the Court, except at and whilst actually sitting at his General Term, and in the business of that branch of the Court. The business of the General Term is with appeals. With this judgment of the Supreme Court here complained of, entered upon the remittitur from the Court of Appeals directing it, the General Term had nothing whatever to do; this judgment was (according to the usual practice) entered *upon the order of the single Justice then holding and presiding at the Special Term* (fol. 163) *where all motions for orders are by the New York practice required to be made and determined;* the Special Term in the First Judicial District is *a Court held by the single Judge who presides* there for a term of one month at a time; the judgment now at bar was, therefore, substantially and in effect what is by the rule of *Bartmeyer vs. Iowa* required—*a judgment rendered or passed by a Court having pro hac vice only a single Judge*—and the conclusion is inevitable that an allowance of the writ by the single Judge holding that Court at the time when the application for such allowance was made to him, was *a proper and sufficient allowance to give this Court jurisdiction.* The New York practice requires that, unless there be some particular reason for applying to another Justice, all applications for orders, whether *ex parte* or on notice, must be made to the Justice then assigned to hold Special Term of the court for hearing motions in the court room called "Chambers," which is, however, not chambers of the judge, but chambers of the court.

This Court accepts, of course, the statement by the judge who allowed the writ, as to the fact that he was duly assigned to hold the Special Term at the time referred to, and was then the only Justice of the court

sitting, or assigned to sit, and holding court in the judicial district in which the application was made.

Butler vs. Gage, 138 U. S., 52.

And to the suggestion of the brief in support of the motion that the writ should have been allowed by the Chief Judge of the Court of Appeals, it is not necessary to reply further than by the remark that such has not been the practice since *Green vs. Van Buskirk*, 3 Wall., 450—if it ever was the practice—and that, if any case can be found in the books where a writ of error from this Court *to the Supreme Court of the State of New York* was allowed by the *Chief Judge of the Court of Appeals*, and was here found sufficient, it is merely an example of the indulgence with which this Court regards substance and overlooks mere technicalities as to form in the practice it has established.

An allowance of a writ of error to the Supreme Court of New York, by the Chief Judge of the Court of Appeals of that State, may be permissible under the practice prescribed by this Court; but, if so, the Chief Judge of the Court of Appeals is certainly not the only State Judge who is authorized by the practice to sign such an allowance.

The strict construction, as well as the reasonable and proper construction, of the rule requires that, in view of *Green vs. Van Buskirk*, 3 Wall., 450, as the judgment to be reviewed has become the judgment of the New York Supreme Court, some judge of *that* Court must have the authority to allow a writ of error; if so, Mr. Justice PATTERSON was on the 24th of August last. when this writ was allowed, the only judge of that court who could grant the application, the only one to whom the application could properly have been made, *and his allowance necessarily gives this Court jurisdiction.*

No question is made as to the authority of the same judge to sign the *citation* as he did; and the defendants

in error have actually entered their appearances here under that citation. His authority is clear under the express terms of § 999 of the Revised Statutes of the United States, and under *Green vs. Van Buskirk*, 3 Wall., 450. The very purpose of the rule in *Bartmeyer vs. Iowa* was to prescribe that, as no judge except one authorized by the statute to sign the citation may allow the writ, any judge empowered by the statute to sign the citation may allow the writ.

POINT IV.

Having thus shown that the motion to dismiss the writ should be denied on each of the grounds on which it is urged, and, in doing so, having necessarily shown that the case presented by the plaintiff in error to this Court is not frivolous, and that the writ was taken out for sufficient reason and not for delay, it is perhaps unnecessary to go further, unless the Court may now dispose of the case on the merits, by a reversal of the judgment, in view of the fact that, by their motion to affirm the judgment below, the defendants in error have themselves invited the Court to make now a final adjudication without further argument.

What is here added is to show that, on the merits, and as the facts appear in the printed record here, the defendants in error were and are stockholders of the National Express and Transportation Company, the corporation of the State of Virginia in question, and under

the laws of that State liable as such stockholders to this plaintiff in error, whose title is founded upon judicial proceedings of Virginia in evidence in the record, which laws and judicial proceedings of Virginia were (not overlooked, but, by misconstruction,) disregarded by the courts of New York in the judgment here complained of and sought to be reviewed by this Court.

It is well settled in New York that the only questions before the General Term were questions of law arising upon defendants' exceptions taken at the trial; the General Term could not set aside the verdict on the facts, unless there was such an absence of evidence to support a material finding that the court could determine as matter of law that the fact was unproved (*Metropolitan National Bank vs. Sirret*, 87 N. Y., 325).

The only question before the Court of Appeals was whether the General Term had committed an error of law in granting the new trial (§ 194 Code of Civil Procedure).

The rule is the same, when the verdict is directed by the trial court in a case like this, as in the case of any other verdict; the defendants in the case at bar, at the conclusion of the evidence, moved for a nonsuit (fol. 153), and, when that motion was denied, did not ask to go to the jury; they thus consented that the questions of fact be determined by the court, and the determination made by the direction of the verdict in favor of the plaintiff is final as to the facts (*Ormes vs. Dauchy*, 82 New York R., 448; *Dillon vs. Cockroft*, 90 New York R., 650; *Stratford vs. Jones*, 97 New York R., 589; *Provost vs. McEncroe*, 102 New York R., 650; *Kirtz vs. Peck*, 113 New York R., 226; *Sutter vs. Vanderveer*, 122 New York R., 654.) As to all the questions of *fact*, therefore, involved in the issues made by the allegations of the separate answers of the defendants concerning the circumstances under which the certificates were issued in the defendants' firm name of Harrison, Garth & Co., all

those facts must be held to have been found by the verdict in favor of the plaintiff; and if there was *any* evidence on the trial to show (Garth's testimony to the contrary notwithstanding), or tending to show, *that defendants' firm accepted, even for an instant and for any purpose whatever*, the situation made by the issue of the certificates in the firm name, the finding of the verdict that the defendants were stockholders, like every other material finding, is *conclusive*, as to that fact upon any and every appellate tribunal. The case upon appeal, as settled (and as it appears in the printed record here, fols. 5–154), is not accompanied by a certificate or statement that it contains all the evidence upon the trial, or all the evidence bearing on the questions sought to be reviewed at the General Term on the exceptions taken by the defendants at the trial. On the contrary, it distinctly appears, in many places, that matters offered and admitted and put in evidence on the trial were omitted from the case on appeal, and so do not appear in the printed record here *(e. g.*, at fol. 128 the books of the company are recited to have been read in evidence, but the contents of those books are not shown*)*; in fact, the case contains only such of the evidence as defendants themselves assumed to be necessary to present their exceptions to the General Term, which incidently, however shows some evidence to support the verdict in all respects. The rule under such circumstances is well established in New York that no appellate tribunal can assume that there was not abundant evidence on the trial to support the verdict *(Porter vs. Smith*, 35 Hun R., 119; same case, 107 New York R., 534; *Aldridge vs. Aldridge*, 120 New York R., 616; *Travis vs. Travis*, 122 New York R., 453; *Patterson vs. Robinson*, 116 New York R., 199; *Thompson vs. Simpson*, 128 New York R., 283, 284*)*. After the verdict had been rendered, therefore, only one question was left for an appellate tribunal: Was there *any* evidence on the trial, which appears in the printed

record, to show that these defendants in error became stockholders?

These rules of procedure in the practice of New York are here recited merely to explain why, in the case upon appeal, prepared by defendants to show only so much of the evidence on the trial as they considered necessary to support their exceptions when heard at the General Term, was not by the plaintiff so amended as to show *all* the evidence, including the contents of the books of the company mentioned at folio 128. Plaintiff was not required by the New York practice to see that the case on appeal contained anything more than *some* evidence on each material question to support the verdict (*Porter vs. Smith*, and other cases cited *supra*).

The material questions to be considered do not arise under the rules of the common law in respect of the transfer of stock, or under the custom of brokers, either in New York or in Baltimore, dealing in stocks governed by the common law. They arise under the statute law of Virginia, governing the transfer of stock and prescribing the liabilities of persons whose names stand upon the books of a corporation of Virginia, either as original subscribers for stock, or as assignees, or as assignors of stock. It is not pretended that the National Express and Transportation Company knew anything about the alleged relation between Ficklin and the defendants. Nor is it pretended that the company knew anything of the instructions alleged to have been given by Garth to defendants' Baltimore brokers, McKim & Co. On the contrary, the company dealt with defendants as purchasers and transferees of stock in defendants' firm name, and, as such, accepted defendants as stockholders and placed their firm name upon its books. It is a conclusive presumption of law that the creditors of the company dealt with it and gave credit to it upon faith of the names appearing upon its books as stockholders.

There was not only evidence to support the determi-

nation of the trial court, that the defendants became stockholders of the National Express and Transportation Company—but that evidence is clear, convincing and not affected by anything else in evidence.

(1) The defendants, by their firm name of Harrison, Garth & Co., appear upon the books of the company as holding 355 shares of the capital stock on and after July 12, 1866, and as holding 135 additional shares on and after July 26, 1866, and there is no dispute or question as to those facts (fol. 127).

The general, though not always the conclusive, test to determine whether the defendants became stockholders of such a corporation as the National Express and Transportation Company is found in the inquiry whether they appeared upon the books of the company to be such stockholders. The law of Virginia appears further on in this point. In a creditor's action, or in one prosecuted by a trustee for the benefit of creditors, to enforce the liability of stockholders, arising under the law of New York, the question in that State, ever since *Adderly vs. Storm*, 6 Hill R., 624, and *Rosevelt vs. Brown*, 11 New York R., 148, has been, whether the party sought to be charged as a stockholder held the legal title to the shares, and the fact that his name appears upon the company's books as a stockholder has generally been the evidence to establish that legal title. As was held in the cases cited, and, as is always held, except under circumstances not appearing in the case now at bar, "the Courts will not look beyond the legal title," and, as was said by this Court in *Turnbull vs. Payson*, 95 United States R., 418: "Where the name of an individual appears on the "stock-book of a corporation as a stockholder, the "*prima facie* presumption is that he is the owner of "the stock, in a case where there is nothing to rebut "that presumption; and, in an action against him as a

" stockholder the burden of proving that he is not a " stockholder, or of rebutting that presumption, is cast " upon the defendant."

Upon the trial, the defendants relied upon the testimony of defendant Garth (fols. 129-136) to rebut that presumption, and to show that defendants are not chargeable as stockholders of the National Express and Transportation Company; the court (Mr. Justice PATTERSON), however, distinctly and necessarily found against that contention by denying defendants' motion for a nonsuit. The words the court then used were not a part of the printed case on appeal, and, of course, do not appear in the printed record now; but to express the reasons for what the trial court *did* in directing the verdict for plaintiff, this is appropriate, and may be assumed to be what the Court then *said*: "The testimony given by Mr. Garth was " not of that satisfactory and full and complete kind " which would relieve the defendants of the liability " by showing that they were merely the pledgees of " the stock, intending only to be pledgees, and not " having any dealings with it or transactions with " it as stockholders. I asked Mr. Garth myself (fols. " 135, 136) the question whether or not the firm " received the notification of the purchases by the " Baltimore brokers, and received also the new certifi- " cates, one of which was introduced in evidence, " *before* defendants paid for the stock. He did not " know. There is no evidence here to show that he or " his firm did not deal with those certificates or " the shares of stock, as the owners of them—no " matter how they were procured, no matter who sent " them. But he did deal with them with the intention „ of disposing of the legal title which he knew had " been put in his firm name, and which he intended " to get rid of by selling the shares to reimburse the " firm for the amount it had advanced to Mr. Ficklin. " The defendants' firm endorsed the certificates as

" having a legal title to confer upon a purchaser from " them."

(2) Each of the separate answers contains this *unqualified admission:* "In the month of May, "1866, *the said firm" (Harrison, Garth & Co.)* "**caused to be purchased** *for the account of one* "*of its customers four hundred and ninety shares of the* "*capital stock of the said National Express and Trans-*"*portation Company,* **being the same shares** "**mentioned in the complaint,** at the Board of "Brokers, in the City of Baltimore, in the regular "course of business" (fols. 16, 28, 38).

The evidence shows that the purchase of 355 of the shares was made by McKim & Co., brokers, in Baltimore, who dealt only with the defendants as their customers, entered defendants' firm name on their books (fol. 121) as the purchasers, reported the purchases to defendants, and rendered them a statement of the account for the purchases—which account defendants accepted and paid as rendered and without objection, though the evidence does not show the date of payment (fols. 112 116, 123 125, 129–136); the other 135 shares were purchased by defendants through some some one else than McKim & Co., not disclosed by so much of the evidence as appears in the printed record—but the admissions above quoted from the answers show that purchase also to have been made in Baltimore and in the month of May, 1866.

(3) The original certificates representing the 355 shares purchased by McKim & Co. were held for two months by somebody, the evidence does not clearly show by whom, though the reasonable presumption is they had either been forwarded to defendants or, the purchase having been reported, were by the special direction of the defendants held subject to the order of defendants in Baltimore; certainly that would have been

the usual course of business. The original certificate or certificates representing the other 135 shares were held even longer—but where or by whom does not appear—and the same reasonable presumption exists as to them. July 12, 1866, McKim & Co., defendants' agents and brokers in Baltimore, surrendered to the company the original certificates representing the 355 shares they had purchased—and thus procured new certificates, dated the next day, to be issued by the company to and in the name of Harrison, Garth & Co. —the firm name of defendants (fols. 114, 127). On the 26th day of July, 1866, the original certificates representing the other 135 shares were surrendered to the company, and a new certificate for those shares also was that day issued by the company to defendants in their said firm name (fol. 127); the printed case upon appeal (now a part of the printed record here), *which does not profess to contain all the evidence on the trial*, does not show who had that transfer made to defendants; but the printed record does show (fol. 128) that books of the National Express and Transportation Company were admitted and read in evidence whose contents are not set forth, and one of those books shows, how and by whom that transfer of the 135 shares was made, so that the trial court knew the fact. It would have been very remarkable if all those transfers to the firm name of defendants, made so long after the purchase of the stock in May, 1866—transfers made at different times and by different persons who were all related in some capacity as agents to defendants—had been made without some direction given by defendants themselves.

(4) The evidence shows that all the certificates issued to defendants in their firm name and sent on by McKim & Co. were received by the firm of Harrison, Garth & Co. at the same time, but does not show the date of such receipt; it does not appear at what date

the defendants received the new certificate for the 135 shares issued to them in their firm name; but it is shown that defendants afterwards sent all the new certificates, representing the 490 shares in the aggregate, to McKim & Co., to be sold and transferred to some other name (fols. 132, 135). Garth testifies that defendants did not send the certificates to Ficklin "because we had paid for them, and he owed us the money for them" (fol. 132); when the certificates were sent back to Baltimore for sale of the shares they represented, each was endorsed by defendants with a power of attorney to transfer, signed by Garth himself in the firm name (fols. 128, 129, 135); his own counsel and the Court made several and various attempts (fols. 135, 136) to ascertain from Garth how long a time elapsed between the receipt of the certificates by defendants and their despatch to McKim & Co. to be sold, or whether the account rendered by McKim & Co. for the purchases made by the latter was or was not paid by defendants before defendants received the new certificates standing in their firm name—and so in ignorance of the fact of the transfers to defendants' firm name; but the witness was unwilling to swear that the shares had been paid for by defendants before receipt of the new certificates, or to swear how long defendants held the new certificates before McKim & Co. sold them, endorsed with defendants' power to transfer; his only approximation to that period was by reference to McKim's account (fols. 136, 121) which shows no dates but days of purchase of installments of the 355 shares in May, and sales of all the 490 shares August 10, 1866. Twenty-four years after the occurrences, the witness expressed *the opinion*, on the witness stand, that the new certificates were sent back to McKim "promptly," and as soon as he (Garth) individually became aware they had been issued in the firm name of defendants—but he would fix no date for anything, and did not pretend the recitals of the cer-

tificates were not known to *the firm* before he *individually* learned them; it is evident from the whole tenor of Garth's testimony that all the certificates were endorsed by the defendants for transfer at one and the same time, and were all forwarded to McKim together, to be sold *in a panic of some kind;* they were all actually sold by McKim in Baltimore August 10, 1866, at "slaughter prices," greatly below the rates at which he had purchased those he bought for defendants in May (fol. 121); the only one of the certificates ever surrendered to the company by the purchaser for transfer is Exhibit K in evidence (fols. 128, 129), and the power of transfer on it is dated August 27, but that date may have been inserted by the purchaser from defendants, who may have received the certificate with the power in blank; the cancellation of the U. S. Internal Revenue stamp affixed to the power, however, shows August 10 to be the exact date when defendants signed the power and forwarded the certificate to Baltimore to be sold—Section 156 of Chapter 173 (June 30, 1864) of the Acts of Congress of that year, entitled "An Act to provide internal revenue to support the Government," &c., having provided that "in "any and all cases where an adhesive stamp shall be "used for denoting any duty imposed by this act, ex- "cept as hereinafter provided, the person using or "affixing the same shall write thereon the initials of "his name, *and the date upon which the same shall be* "*attached or used*, so that the same may not again be "used;" and under that act a "power of attorney for "the sale or transfer of any stock" was taxed, and required an internal revenue stamp of 25 cents, such as was affixed to the power here in question and canceled by defendants August 10, 1866 (fol. 129). It is thus made clear *not only* that the defendants, by endorsing the certificates and selling the shares they held standing in their own firm name, as they did, asserted and exercised rights and authority which be-

long only to a shareholder of the corporation, *but that* defendants had continued to hold the certificates in their own name for nearly a month before attempting to change in any respect the situation made July 13 by registration of their firm name on the books of the company as shareholders. The printed case on appeal (now a part of the record here) also shows, incidentally, the real occasion for the indignation Garth says he felt when he discovered that defendants' firm name was registered among the stockholders of the company —there had been about, that time, a new assessment or call by the Board of Directors of five dollars per share to which all shareholders were liable, under the law of the company (the law of Virginia) and the express reservation of the recitals (fol. 128) of the stock certificates themselves; and, though the other evidence on this point which was admitted on the trial (the contents of books, fol. 128) was not in the printed case on appeal (and so is not in the printed record here), that new five-dollar call or assessment appears at folio 121, where the transfer actually made August 27, 1866, by defendants' assignee of the one hundred shares represented by Exhibit K (fol. 121), was effected only on payment of the sum needed to show that those one hundred shares had paid twenty dollars per share to the company; whereas all that had been required to be paid to the company as late as July 26, the date of the latest of the certificates issued to defendants in their firm name, had been fifteen dollars per share (fol. 127).

It was suggested on the trial that the 390 shares other than those represented by Exhibit K were not transferred on the books of the company after the sales made August 10, by McKim & Co. for defendants, because the transfer books were then closed; but the fact that the shares represented by Exhibit K (fols. 128, 129) were actually transferred as late as August 27 (fol. 121) shows the books to have been open as late

as two weeks after the sales made by defendants. The real explanation of the neglect of the other purchasers from defendants to transfer their shares was that they hesitated about paying the new five-dollar assessment, which payment was required by the law of Virginia (quoted further on in this Point) to be made before the certificates could be transferred; and—if defendants ever ordered McKim & Co., after selling the shares August 10, to make transfers from the name of Harrison, Garth & Co. to the names of the purchasers—as Garth, 24 years after the occurrences, says he thinks defendants did—the new five-dollar assessment explains also why McKim did not actually make the transfers on the books of the company. It could not (without the consent of the company) be done until there should be payment of the $5 per share to the company (Code of Virginia of 1860, Ch. 57, § 24, quoted below), which was exactly what defendants desired to escape by selling their shares.

(5) We have already shown, by reference to New York cases, that, under the law of New York, the fact that one's name appears on the books of a corporation as a stockholder is, in a creditor's action to enforce the liability of stockholders, presumptive evidence of the fact that he was a stockholder. The statutes and jurisprudence of Virginia, put in evidence on the trial, and on appeal cited under the stipulation at folio 155, determine that question in the same way.

This case is clearly distinguished from the class of cases like *Mathews vs. Albert*, 24 Indiana R., 527, *McMahon vs. Macy*, 51 New York R., 155, and *Burgess vs. Seligman*, 107 United States R., 20—in which it is held that, in defending against liability to creditors of a corporation, parol evidence is admissible to show that the stock is held not in ownership, but as collateral security, or otherwise as trustee. *Such cases depend upon special statutes;* in all such cases

the statute provides, in effect, that "no person holding stock as executor, administrator, guardian or trustee, or as collateral security, shall be personally subject to any liabilities as a stockholder"—but that the person pledging the stock, or for whose benefit it is otherwise held, shall have the liability as stockholder; and, because of such provision of the statute, parol evidence is admitted to show in what right the stock which comes into question is held. But the reason given by the courts for the admissibility of such evidence in such cases has no application here. "There is nothing"—said the New York Court of Appeals in *McMahon vs. Macy* (cited and approved in *Burgess vs. Seligman*, 107 United States R., 31, 32)—"there is nothing in any statute which makes the books of the company incontrovertible evidence of the ownership of the stock. A person may be the absolute, legal and equitable owner of stock without any transfer appearing upon the books." The statute law of Virginia expressly recognizes and establishes such rights, *inter partes*. But, as to the company, and as to its creditors, the law of Virginia makes the books of the company in a case like this, the incontrovertible evidence of the ownership of the stock. By the Virginia Code of 1860 (which governed these transactions, and was in evidence on the trial, and, on appeal, was cited (fols. 170, 176) under the stipulation at fol. 155) Ch. 57, Section 27, it is provided that: "If any such "person" (appearing upon the books of the company as the owner of shares) "shall, for valuable considera- "tion, sell, pledge, or otherwise dispose of any of his "shares to another, and deliver to him the certificate "for such shares, with a power of attorney authorizing "the transfer of the same on the books, the title of "the former (both at law and in equity) shall vest "in the latter, so far as may be necessary to effect "the purpose of the sale, pledge or other disposition, "not only as between the parties themselves, but

" also as against the creditors of and subsequent pur-
" chasers from the former, subject to the provisions of
" the twenty-fifth (25th) section." That 25th section is as follows: "*A person in whose name shares of stock*
" *stand on the books of the company shall be deemed the*
" *owner thereof, as regards the company.* And the previous section (Section 24) provides that "no stock
" shall be assigned on the books without the con-
" sent of the company, until all the money which has
" become payable" (to the company) "thereon shall
" have been paid; and on any assignment the assignee
" and assignor shall each be liable for any installments
" which may have accrued, or which may thereafter
" accrue, and may be proceeded against in the manner
" before provided."

It was subject to these provisions that these defendants dealt in this stock in their firm name, and, in order to get the consent of the company to the transfer of the stock upon its books to them, paid the company the installments then due the company thereon. The money was paid and the vendors duly made transfers to defendants on the books of the company in the manner prescribed by law, and in the only way in which the transfers could be made. They received and accepted the certificates, so far as the company was concerned, and afterwards sold and transferred the shares in their own firm name to purchasers from them, without any demur or objection made known to the company or to its creditors. Neither the company nor its creditors knew anything about defendants' alleged confidential relation with Ficklin; and, if such confidential relation had been made known, defendants' contract with Ficklin would not have at all altered their statutory relations towards the company, or to its creditors—on the contrary, would have shown, by its terms, that Harrison, Garth & Co. were bound as stockholders, not only as between themselves and Ficklin, but as between themselves

and the company—especially as, according to the law of the company, their contract with Ficklin could not have been performed and the stock could not have been securely "carried" by defendants for him except by entries upon the books of the company in their firm name. It thus appears that defendants actually assumed, intended to assume, and were by the law of Virginia required to assume, on the books of the company, the position of owners, holders and controllers of the stock, with all the incidental rights and powers and liabilities. It was in accordance with those statutes and with the foregoing views that *Hawkins vs. Glenn*, 131 United States, 335, was decided, and it was in like accordance that in *Glenn vs. Ligget*, 135 United States, 548, approving in all respects *Hawkins vs. Glenn*, this Court said: "The "rights of the parties in the present case must be ad- "judicated according to the requirements of the statutes "and jurisprudence of Virginia, which State created "the corporation, and in reference to which laws the "contracts of subscribers to stock were made." Those statutes were proved in evidence on the trial of this action; many of them are shown in the printed record (fols. 56–66), and others were quoted in the Court of Appeals and have been here above quoted under the stipulation at folio 155 of the printed record. Under Section 942 of the Code of Civil Procedure of New York, the published reports of adjudications of the Courts of Virginia are presumptive evidence of the law of that State. The jurisprudence of Virginia upon the subject here discussed is fully shown in *Lewis vs. Glenn*, 84 Virginia R., 947; *Vanderwerken vs. Glenn*, 85 Virginia R., 9, and *Hambleton vs. Glenn*, 85 Virginia R., all of which are in evidence in this action under the stipulation at folio 155 of the printed record, and were referred to in the Court of Appeals.

(6) The contention of the defendants amounts, at

last, to this : That, because they now allege that they had not intended to become the absolute owners of the stock, but were merely " carrying " it for their customer Ficklin, were holding it only as collateral for his indebtedness to them for the purchase money, commissions, interest, &c.—and notwithstanding the fact that defendants dealt with the stock as having the legal title to it—Ficklin and not the defendants themselves should be treated and held as the party liable in this action by the trustee for creditors of the corporation.

The statute of Virginia is, as we have shown, expressly against allowance of that defense—takes no heed of who is the stock *owner* and regards only the stock*holder* of record on the books of the company, whether he holds it as owner or only as collateral ; and so is the law of New York well established and always enforced by the Courts of that State *(Adderly vs. Storm*, 6 Hill R., 624 ; *Rosevelt vs. Brown*, 11 New York R., 148 ; *Matter of Empire City Bank*, 18 New York R., 199 ; *Vail vs. Hamilton*, 85 New York R., 458 ; *Cutting vs. Damerell*, 88 New York R., 410*)*.

As was said by the Court of Appeals, discussing a statute of New York, in some of its provisions like the law of Virginia, in an action by a Receiver to enforce the liability of a stock*holder :*

> " He must take the responsibilities of that situa-
> " tion. He comes within the terms and the policy
> " of the act. His title may be imperfect. Equities
> " may exist between him and other parties ; the
> " shares may be in dispute ; they may be claimed
> " by some one else in hostility to his own right.
> " The statute has no regard to such questions.
> " The person who has caused or allowed his title
> " to be registered on the books cannot deny the
> " truth of that representation and disavow the

> " ownership when it ceases to be a benefit and
> " comes to be a burden."
>
> *Matter of the Reciprocity Bank*, 22 New York R., 17 (COMSTOCK, C. J.).

In that condition of the evidence under the law of this case, whether the law of Virginia or the law of New York, what is there in the printed case, upon this appeal (now a part of the printed record here), to justify the General Term or the Court of Appeals in holding, in effect, that there was *no* evidence at the trial to support the determination of the trial court that defendants are liable to this plaintiff as, and in fact were, stock*holders* of the National Express and Transportation Company—defendants, at the trial, having moved for a nonsuit, and, when that motion was denied, not having asked to go to the jury, and so having submitted the facts to be determined by the trial court with the same effect as if ascertained by the verdict of a jury, and the trial court having thereupon directed a verdict, which was duly rendered in favor of this plaintiff in error and against these defendants in error—and the case on appeal (now a part of the printed record here) showing no statement that it contains all the evidence on the trial or bearing on the questions sought to be reviewed ?

POINT V.

On that recital of the facts, including the laws and jurisprudence of Virginia, shown in evidence on the trial, the plaintiff in error was entitled at the General Term and in the Court of Appeals, upon the law, to judgment in his favor on the verdict rendered on the trial.

The dependence of defendants in error here must be upon the opinions shown in the record to have been written in the Courts below. But, able as they are, neither of those opinions carries conviction, because, feeling this to be a hard case, the learned judges who delivered those opinions have misapprehended some of the material facts in evidence, and have fallen into fallacies subversive of their conclusions.

For example, the learned Justice who wrote at the General Term expresses (fol. 159) the opinion that, by endorsing for transfer in August the certificates issued to them in their firm name in July, and then selling the shares, the defendants did all they could have done to repudiate the transaction and to relieve themselves of liability as stockholders, resulting from acceptance of certificates so issued—but presently qualifies the remark by saying of defendant Garth (fol. 159): "He could not prudently return the "certificates to the company and demand their "cancellation, *for the reason that he had advanced his* "*money upon the security of the shares, and he was* "*not called upon to stand upon Ficklin's single responsi-*"*bility.* * * * This was, in fact, the only way to get "the shares out of the firm's name *and at the same time* "*secure their advances.*" It is respectfully submitted that, whilst the course defendants took may have been the best to secure their advances upon the security of

the shares, it was certainly the most conclusive evidence they could give of their acceptance of and assent to the character of holders of the *legal title* to the shares, with the absolute right to control and dispose of them.

And, again, in the opinion in the Court of Appeals, (fol. 169) it is said: "As has been explained, the de- "fendants, instead of returning the certificates to "McKim with a demand that their form be changed, "assigned them in blank and required him to sell them. "Unexplained, the act recognized an ownership and "the existing transfer to the defendants, and was "*imprudent* exactly for that reason. Why they did so "we can easily see. They must have realized that "McKim might be unable to procure a cancellation of "the transfer on the books, or meet with delay and "possibly litigation in the effort, and that if the certifi- "cates were delivered to Ficklin to be registered in "his name and then be assigned by him in blank to "defendants, they would be left without security in the "interim. *Both methods of procedure, although acts of "disaffirmance and repudiation, would require an "asssignment by the defendants of the formal record "title in them. The company would naturally require "it for their safety and to preserve the regularity of "their books if a cancellation were sought,* and it would "be equally necessary in order to put title in Ficklin."

But surely, and with all respect, that is not a statement of the law of such a case—whether the law of Virginia or the law of New York. When a *cancellation* of his name (in the list of stockholders) is demanded to be made by the company after certificates have been refused to be accepted by the nominal transferee—*who insists that he is not, and did not intend to become, and will not be to be treated as a stockholder,* and returns the certificates to the company, with a request that the record of transfer to him be canceled on the books—no corporation has any right

to require such a person (whether for the safety of the company or to preserve the regularity of the books of the company, or for any other reason whatever) *to endorse those certificates for transfer*—to do an act which would not only not accomplish the cancellation of the book record of transfer *to* the objecting individual, but would perpetuate that record. The learned Judge has confused what is ordinarily called the "cancellation" of a stock certificate at the time of surrendering it for issue of a new certificate representing the same shares, with the very different thing here in question—being a cancellation of the record on the company's books of a name of an individual as the transferee of the shares represented by the certificates he declines to accept. Any one familiar with the stock certificate books and stock transfer books of a new corporation of doubtful prosperity, is aware of the fact that there are frequent instances where certificates of stock are refused by, or for some other reason are not delivered to, the nominal owner—the person attempted to be made a stockholder, in some instances declines to become one, and in other instances is unable to pay for the shares where payment is prerequisite to delivery to him of the certificates; and all that the corporation can do about it, when he refuses to become a stockholder, and has the right to so refuse, is to erase the name from its books, or to have it crossed out, or to annotate it with a memo. that such person declines to be a stockholder. What is ordinarily called "canceling" a certificate of stock at the time of registering on the company's books the transfer to another of the shares it represents, is merely a cancellation of the official signature and corporate seal of the corporation there appearing, so as to destroy the negotiability of the certificate if it should be stolen from the company's files; the certificate is not otherwise canceled, but is usually pasted into the

stock certificate book itself for preservation and use in tracing the shares it represents through all the transfers that may be made of them from time to time.

In the case at bar, the thing which would have been accomplished, had the defendants returned the certificates to the National Express and Transportation Company and demanded that those certificates be canceled, and that the registry of the firm name of defendants on the books of the corporation, as stockholders, be also canceled—and had those demands been complied with—would have been that the corporation would have been obliged to return to defendants the old certificates, in the names of their vendors, which had been surrendered at the time of the transfers to defendants; and, if the company's official signature and corporate seal on those old certificates had been canceled at the time of surrender for transfer of the shares they represented, to so restore that signature and that seal as to allow the old certificates to be held by defendants exactly as they were held immediately after purchase of the shares by defendants and before the objectionable transfer made. The company would then have done all it could do, and everything that was requisite, to restore matters to the status existing before the transfer.

If it had then been desired by the defendants to have a transfer of the shares to Ficklin, such transfer could have been made by the company upon surrender by defendants of those old certificates, and the issue of new certificates in the name of Ficklin.

Nothing of that sort was done or attempted to be done by defendants; and it is exactly for that reason that what they did do, and what they omitted to do, *was a ratification* of the transfer to themselves, and *was not a repudiation* of that transfer. There is no act done by defendants, no word spoken by defendants, as shown by the evidence, which was an expression to the company of any intention on the part of defendants to repudiate the transfers made to their firm name; all

that was done or said was an acceptance of that transfer—and, on all the evidence, the jury was authorized to find, as it did, that the suggestion of any repudiation by defendants of the transfers to them was an afterthought and a mere pretense. The real and only occasion for sale of the shares by defendants was afforded by the new assessment of five dollars per share, made by the Board of Directors, and the alarming financial condition of the company, which resulted in the assignment for the benefit of creditors two months later.

Again, in the opinion of the Court of Appeals, on page 168 of the record, it is recited that, upon receipt of the certificates in the firm name, Garth wrote to McKim repudiating the transfer and denying his authority to make it; but that is another misapprehension of the facts, and there is nothing in the evidence to support it; the communication to McKim was merely a direction to sell the shares and to transfer them to the purchasers (fols. 131, 133); and the "indignation" Garth says he felt about the transfers was expressed only to his own clerks or other people in his own office (fol. 134).

Again, it is said in that opinion of the Court of Appeals (fol. 168): "Neither the company nor any of its "creditors did anything or forbore anything upon "the faith or because of the appearance of owner-"ship (of the stock) in the defendants. The case is "bare of any such proof." But that, too, is a misapprehension. The case on appeal in the Court of Appeals (now a part of the printed record here) shows, at folio 82, that in the record of proceedings in the Virginia Court which made the asssessments on the stockholders was "a detailed statement of the names of all "creditors, and of the amounts of indebtedness to them "severally." Those exhibits and other parts of the exemplified record of the Virginia Court were in evidence at the trial, though they were omitted from the case on appeal, and are not in the printed

record here. But the names of these defendants were registered as stockholders on the books of the company in July, 1866; the company's deed of assignment for the benefit of creditors was made September 20, 1866, with reservation of the possession of the property for a time thereafter, and the company continued in full operation until November, 1866 (fol. 83); during the whole period of from four to five months of active operations of the company after the stock went upon the books in the names of the defendants, it was inevitable, in the ordinary course of business, that many debts should have been contracted. The company was a "going concern" all that time; and from the nature and character of its business it was impossible that it could be carried on without daily contracting a large indebtedness for salaries and wages to its comprehensive army of officers and employees scattered all along its national lines and their branches from New York to New Orleans, for freight to the numerous railroads and other agencies of transportation through which its business was done, for loans or accommodations from banks, and for the general and constantly accruing expenses of administration of so extensive an enterprise. And, accordingly, the company's deed of trust, executed and delivered on the 20th of September, 1866, shows upon its face that the contracting of such debts was deemed necessary for the further continuance and prosecution of its business, and directs the payment of the same. By the fifth clause of the deed (fol. 53) it is provided that the trustees, after paying the expenses of executing the trust, shall next—

"*pay all debts now due or which shall become due* "from the party of the first part to *its officers and* "*employees* for their services as such on or before "the first day of November next, or such previous "time as the trustees are required to take pos- "session of all the property granted as aforesaid."

By the sixth clause of the company's deed of trust

of September 20, 1866 (fol. 54), the debts then due the Baltimore and Ohio Railroad Company and the Bank of Commerce of Baltimore are preferred and secured, part of which, in the ordinary course of business, must have been contracted since the 13th of July, 1866. And by the eighth clause (fol. 54), the trustees are "to "pay, in ratable proportion, the balance of all debts "for which the party of the first part *shall become liable* "*to any railroad company* for transportation of express "matter *after the date of this deed.*"

The principal of the company's indebtedness was estimated, at a meeting of the stockholders held in Richmond, Virginia, on the 10th of October, 1866, to be, as of the 1st of November, 1866, some $350,000 (fol. 168). It is incredible, under the circumstances, that *all* of that indebtedness should have been contracted prior to July 13th, 1866. That a large (if not the greater) part was actually contracted subsequent to that date, must indeed be accepted as here in evidence—and the jury was justified, even by so much of the evidence as appears in the printed record here, in finding the fact so to be.

Again, that opinion of the Court of Appeals (fol. 168) asserts: "There is no pretense that any direction "or authority was given by anybody to McKim to "cause the stock to be transferred upon the books of "the company"—another misapprehension; at folio 115 it is in evidence that, by the custom of brokers, if a purchaser pays for stock, it is transferred to his name by the broker, of course; and all the evidence in the case, read together, certainly enabled the jury to find as a fact that defendants authorized the shares to be transferred to their names as purchasers—355 by McKim, and the other 135 by defendants' other agents who had purchased them—and whose authority with regard to those 135 shares was not questioned by defendants on the trial. And more:

In discussing the question of the authority in McKim

& Co., with regard to the transfers of stock made by them to the firm name of defendants in error, it is decisive here that, independent of any expression *in terms* by defendants of any such authority, the transfers may be assumed to have been made by, or upon demand of, the several *vendors and assignors* of the shares to defendants. Except as to the fifty shares sold by McKim & Co. themselves to defendants, it does not appear that that firm did anything more, with regard to effecting the transfers to defendants, than to hand the old certificates to the company and to receive from the company the new certificates, which had been made out in the firm name of defendants.

The law is well settled that the *vendor* and *assignor* of shares of stock may himself have the shares transferred, on the books of the corporation, to the *vendee*, and that a court of equity will compel the *vendee* to make the transfer at the suit of the *vendor*.

Section 384, Cook's Stock, "Stockholders and Corporation Law," 2d Edition, 1889.

The *vendors* knew nobody but these defendants as their vendees, and, so far as the vendors were concerned, the defendants were the purchasers. "It was his "(vendor's) duty to make the transfer to him, where "only a legal transfer could be made, namely, on the "books of the company; and the purchase was in "itself authority to the vendor to make the transfer" (*Webster vs. Upton*, 91 U. S. R., 71).

It is not to be suggested that the right of the *vendor* extends merely to enforce a transfer *from his own name to some other name. His right is to choose his transferee on the books of the corporation*, as much as it is his right to choose his vendee and assignee. In the case of a corporation like the one here in question, whose shares are not fully paid up, but are liable to assessments for the use of the corporation or *for the benefit of creditors of the corporation*, and where either

the assignor or the assignee of shares may be held for such liability, it is of very great consequence to a shareholder to *select a solvent and responsible vendee, assignee and transferee* of any shares he may desire to sell; otherwise he may be ruined by the transaction. He is not to be required to submit to have the shares he has sold transferred on the books of the corporation *not* to the *vendee* of his own selection (solvent and responsible), but to some insolvent and irresponsible individual to be afterwards put forward by his vendee. For, if he, as *assignor* of the shares, be held liable by the company or by creditors of the company on assessments of the shares he has sold, it is, of course, his right to look to his assignee for recoupment; and that right is of no value without the right to compel his own vendee to become the *transferee* on the books.

And, as the evidence shows (fols. 114, 121, 127), some of the shares in question (50) were *sold by the firm of McKim & Co. itself to defendants*—so that certainly as to those 50 shares of which McKim & Co. were the *vendors* and *assignors* to defendants, the firm of McKim & Co. was entitled and fully authorized to make the actual transfers it did make to defendants on the books of the company.

As to the other *vendors* to defendants through McKim & Co. (fols. 114, 121, 127), the same thing is to be said—each was entitled to make the transfer himself, or to have the transfer actually made, to defendants on the books of McKim & Co., the representatives of defendants in dealing with them; and (so far as appearances go, and there is nothing in the evidence to the contrary) each vendor actually required that to be done by putting in the name of defendants' firm into the formal assignment and transfer he wrote and signed on the back of the certificate he handed to McKim & Co. for these defendants, his vendees. The shares represented by such a certificate could not be sold by defendants, or otherwise made beneficial to defendants,

except by first transferring them to defendants' name on the books of the company and getting a new certificate in defendants' own name. All those certificates were in evidence on the trial at the Circuit, having been pasted on the stubs to which they severally belonged, in the Company's Stock Certificate Book, when surrendered for transfer to these defendants of the shares they represented ; and that Stock Certificate Book was offered and read in evidence at the trial (fol. 128).

Such a transfer, made because required by the *vendor* to be made, cannot be said to have been made without the authority of defendants. In causing shares of stock to be purchased in their own names, defendants must be held to have authorized that to be done which the established law of such transactions required to be done to complete the purchase.

As already shown, it appeared at the trial that the 135 shares purchased by, and transferred on the books of the company to the names of, defendants, which were not purchased through the agency of McKim & Co., were transferred on the books to defendants by another person, and who that person was, was proved on the trial by the books read in evidence but not copied in the case on appeal, and so not set out in the printed record here. There was no pretense of lack of authority in that person to transfer those 135 shares to the defendant's names. It was not necessary that the defendant Garth, individually, should participate in the act of transfer ; as an individual he was only an agent of the firm ; either of the other partners, or any other agent of the firm, equally bound the defendants.

And it is respectfully submitted that, if this case is to go into the jurisprudence of the country as it is left by the opinions handed down in the courts below, there is no security whatever for any one in dealing with a corporation, who relies upon the apparent liability as stockholders of persons whose names

appear on the books of the company. If, after keeping for a month the certificates they received, under the circumstances shown here (without ever suggesting to the company any alleged mistake in the transfer to them), and then selling the shares as their own and for their own benefit and pocketing the proceeds, these defendants are to be allowed, on the utterances of this aged man Garth, on the witness stand twenty-four years after the transaction, unsupported by any other witness or by any contemporary evidence of any kind, to escape a liability as shareholders in this suit, by the creditors of the company—any and every person whose shares of stock are transferred to his name on the books of the corporation, not by his own immediate act, but by his broker or by any other agent, and who shall ever hereafter be sued for such a liability, will have a secure refuge in his own unsupported declaration on the witness stand, a generation afterwards, that, whatever the appearances may be, he did not *intend* to have the shares transferred to his own name; that he was the purchaser of them, not for himself, but for another whose name and whose relation to the matter was not disclosed, either to the purchasing agent or to the corporation, and that, after holding the certificate, years perhaps, and knowing all that time the shares stood in his name on the books, he sold the shares and signed the instrument of assignment and the power of transfer on the back of the certificate *as if owner*, merely because he did not want the delay or bother or expense of having the certificate (alleged, for the first time, after suit brought by a creditor of the company, to have been mistakenly issued to him) canceled by the company, but did want to get the proceeds of sale for his own use, and to get any and every other benefit to be had from the transfer to him.

The broad rule of universal law, always and everywhere enforced in commercial communities where such things as are here in question are dealt in, is that *cred-*

itors of a corporation are entitled to rely upon appearances made by the stock books of the company, and are not to be entangled or tricked by secret intentions never disclosed until liabilities have become long fixed.

The question presented to this Court is the Federal question arising upon the law of Virginia upon the subject; by the statutes of Virginia here in evidence the liability of defendants in error is fixed; this Court has already so decided in *Hawkins vs. Glenn*, 131 U. S., 335, and *Glenn vs. Liggett*, 135 U. S., 547, 548, interpreting the Virginia statute by the broad principle that one whose name appears on the company's books as a stockholder has at least as large a liability to creditors of the company as to the company itself—and that, *so far as the creditors of the corporation are concerned*, only he is entitled to be exempt from liability on shares of stock mistakenly or fraudulently transferred to him who has never thereafter dealt with them *for any purpose for his own benefit* as if he were the owner, after knowledge of the transfer. *That is the single exception to the broad rule of universal law just stated*—we respectfully submit.

The proper remedy was by direct demand upon, and, if necessary (after refusal of such demand), by bill in equity against, the company and the vendors of the stock, or such other persons as may have been concerned in the transaction, praying for a rescission of the alleged purchase of stock, the removal of the complainants' names from the register of the company, a return of the purchase money, that defendants be indemnified for any loss or damage sustained or to be suffered by reason of the alleged purchase and the transfer of the stock to the names of defendants, and such other relief as the particular case made rendered necessary or proper.

And the remedy should have been promptly taken, as soon as the alleged wrong was discovered, and before the rights of innocent third parties had intervened;

for, even if fraud in the purchase and transfer of stock, or of any article, be clearly alleged and distinctly proved, it does not render the transaction void, but only *voidable*, and the transaction stands against the world until a bill is filed to set it aside, and stands forever, if the rights of innocent third parties have intervened without notice of the alleged fraud. The creditors here are such third parties.

As to *ratification*, it is respectfully submitted that alike the facts and the law of the case were overlooked or misapprehended by the State courts—and the opinions of the Court of Appeals (fols. 167-171, 172-177) come down at last to that single point—*the reasoning of the discussion made by the opinion turns upon the ultimate question whether the defendants are or are not to be held to have ratified the transfers of the shares to them*—and the court says in terms, on fol. 173, that what it decided and all that it decided was that there was no act of ratification on the part of the defendants.

If, as between the defendants and Ficklin, or as between the defendants and their agents McKim & Co., who had bought for defendants 355 shares, or as between defendants and the other persons who had bought for defendants the other 135 shares, there was, on the evidence, no ratification by the defendants of the placing of the stock in their names upon the books of the company, it is to be remembered that this is not a case between the defendants and Ficklin, or between the defendants and McKim & Co., or between defendants and those other agents of theirs; nor is it a case betwen the defendants and the company itself. If it were a case, indeed, between the defendants and the company, the evidence would be strong, if not overwhelming, to show ratification by the defendants. For silence or acquiescence may be as effectual as words, or open and express acts, to operate a ratification. The defendants knew that the stock had been placed in their names, and, so far as the company was concerned, made no

objection to the fact, but permitted their names to remain on the company's books. Moreover, so far as the company was concerned, the defendants did all in their power to ratify, *for some purposes, at least*, the placing of their names upon its books. In the first place, they sold the stock as their own, and gave power of attorney for its transfer upon the books of the company, and 100 shares were actually so transferred on the 27th day of August, 1866. The opinions of the Court of Appeals *concede* that defendants made such sales (and the assignments) *for the purpose of getting the proceeds for their own use, and to save themselves the delay, and possibly the bother and expense, of having the (now alleged mistaken) transfers to their firm name canceled by the company.* It is submitted that no proposition of law is more firmly established than that one who, for his own benefit and advantage, ratifies the act of another for *any* purpose, ratifies it, *as to third parties whose rights have intervened*, for every purpose.

There is nothing whatever in the evidence to even suggest that defendants, or either of them, ever asserted to McKim & Co., or to their other agents who transferred to defendants the 135 shares, that the shares had been transferred to defendants' names without authority (fols. 131, 132, 134, 135); the indignation Garth says he expressed when he individually became aware the stock had been registered in the firm name was expressed only to the clerks and other persons present in his own office (fols. 134)—suggesting that one of them, or some other person in the office, had ordered the transfers; and the communication defendants made to McKim & Co. was merely a direction to sell and transfer the stock (fols. 131, 132, 135, 136). The inference could certainly be drawn by the jury that some other member of defendants' firm had instructed McKim & Co., and those other persons who made the traasfers of the 135 shares, to have the shares transferred to defendants' firm name; though, by the form

of another question asked Garth (fol. 131), he is made to appear to say, 24 years after the transaction, that he did not, when on the witness stand, know that any other member of the firm had given any such instructions.

So far as creditors are concerned, defendants acquiesced for more than twenty years in the appearance of their names upon the books of the company; and now, for the first time, when the intervening rights of the creditors have become long fixed and established, the defendants assert that the disclaimer by them, as between themselves and not even to their agents in the matter, of authority in the latter to have defendants' names placed upon the books, must operate with the retroactive effect of obliterating the vested rights of innocent third parties who gave credit to the company without any knowledge or intimation of any want of authority of defendants' agents in the premises, and who were allowed to assume that everything concerning the transfers of stock had been rightly and regularly done. It is not understood that the retroactive effect, either of the ratification or of the repudiation of an act, extends so far as to destroy the intervening rights of innocent third persons. In this case, under the law of of Virginia, where the deed of trust was executed and recorded, and where is the legal domicile of all such of the property of this company as is here in question, the trustee was a purchaser of all the stock appearing upon the books of the company, for valuable consideration and without notice of any equities existing between the apparent stockholders and their agents, or between the apparent stockholders and the company.

The corporation itself may register the transfer, even against the wishes of the transferee.

Webster vs. Upton, 91 U. S., 71.
Upton vs. Burnham, 3 Bissell (U. S. C. C.) R., 520, 525.

In New York "it is well settled that the delivery of

" the certificate with a power of attorney to transfer " passes the entire title, legal and equitable, in the " shares *as between the parties*, and that the provisions " referred to " (for transfers on the books of the company) " are for the protection of the corporation in se- " curing its interests in its relations and dealings with " stockholders " (*Isham vs. Buckingham*, 49 New York R., 222); and the danger of neglect to have a transfer on the books of the company is frequently emphasized:

> " By omitting to register his transfer, the holder " of the certificate and power fails to obtain the " right to vote, and may lose his stock by a fraud- " ulent transfer on the books of the company, by " the registered holder, to a *bona fide* purchaser " (34 N. Y., 80); but in this respect he is in a con- " dition analogous to that of the holder of an " unrecorded deed of land, and possesses a no less " perfect title as against the assignor and others. " And he would have an action against the corpora- " tion for allowing such a transfer in violation of " his rights (*Id.*). He also takes the risk of the " collection of dividends by his assignor or of any " lien the corporation may have on the shares. " But in other respects his title is complete."
>
> *McNeil vs. The Tenth National Bank*, 46 New York, 332.

And the Courts of New York have repeatedly held the transfer on the books, by one who holds shares as collateral security only, to be proper and prudent.

> " Possession must uniformly accompany a " pledge; the right of the pledgees cannot other- " wise be consummated. * * * The capital " stock of a corporate company is not capable of " manual delivery; the scrip or certificate may be " delivered, but that of itself does not carry with " it the stockholder's interest in the corporate

" funds; nor does it necessarily put that interest
" under the control of the pledgees. The mode in
" which the capital stock of a corporation is trans-
" ferred usually depends on its by-laws. * * *
" The case does not show what the by-laws of that
" corporation were. It may be that nothing short
" of the transfer of the title on the books of the
" company would have been sufficient to give
" defendants the absolute possession of the stock
" and to secure them against a transfer to some
" other person. In such a case the transfer of the
" legal title being necessary to the change of pos-
" session is entirely consistent with the pledge."

Wilson vs. Little, 2 New York R., 446.

" As he was to hold the shares as security for
" the balance of the purchase money which he had
" advanced, it was proper and entirely consistent
" with the nature of the transaction that he should
" take the title in his own name. This was
" necessary, moreover, for his safety, for if default
" should be made he would have a right to sell it
" to reimburse himself, and he would be obliged in
" that event to give a title to the purchaser from
" him."

Horton vs. Morgan, 19 New York R., 172 (DENIO, J.), cited with approval in *Markham vs. Jaudon*, 41 New York R., 243.
See also *Caswell vs. Putnam*, 120 New York R., 157.

In *Wicks vs. Hatch*, 62 New York R., 540, what was done in *Horton vs. Morgan* is referred to as the " usual " manner and custom in similar cases."

In *Ketchum vs. Bank of Commerce*, 19 New York R., 499, the pledgee of the stock transferred the stock to himself, and was justified by the Court.

PART VI.

It appears, therefore, on the face of the record in this case that the facts, as they were actually presented below for adjudication, made it necessary for the State courts of New York to consider and give effect to the laws of Virginia, in view of the peculiar jurisprudence of that State rather than the general law of the land. It also appears on the face of the record and in the opinions of the Court of Apeals (fols. 170, 176) **that particular provisions of the statutes of Virginia, in evidence** (fols. 56–66, 155), **were urged upon and specially considered and discussed by that court, which could not have made the determination it did make without deciding against the contention of plaintiff in error as to the true meaning and effect of those laws, as charged in the assignment of errors. On that determination arose the federal question here presented.** *(Chicago and Alton Railroad Co. vs. Wiggins,* 19 U. S., 624*).* **And** *(Glenn vs. Liggett,* 135 U. S., 548*)* **this Court has, in the case of Hawkins vs. Glenn, 131 U. S., 232, ascertained and determined, for the case now at bar, what construction is by the jurisprudence of Virginia put upon those statutes.**

The case of *Hawkins vs. Glenn,* 131 U. S., 322, is decisive of the law of Virginia as it is to be applied to the case now at bar. For convenience, it is here

quoted at length. The evidence is set forth in the report as follows:

> "The defendant testified that he subscribed for "two hundred and fifty shares under the following "circumstances: That, at the instance of three "other citizens of North Carolina—viz., K. P. "Battle, J. M. Hoge and B. P. Williamson—he "went to Richmond in the fall of 1865, and pro- "posed to the parties superintending the reception "of subscriptions to take fifty shares each for the "above-named persons, and one hundred shares "for himself, having in contemplation other parties "who might wish to take fifty shares of this one "hundred; that the superintendent suggested that "it would be more convenient to place his name "only upon the books as subscriber for the whole "two hundred and fifty shares, and this was done, "the initials of the three persons being at the "same time endorsed as a memorandum on the "subscription paper; that in January, 1866, when "the company was organized, he, being one of the "directors, informed the Board of Directors of "the terms of his subscription as above, and no "objection was made thereto; that he instructed "the officer of the company whose business it was "to issue certificates to issue five of fifty shares "each, three of them in the names of the above "parties and two to himself, and at the same time "paid two hundred and fifty dollars which had "been assessed upon the two hundred and fifty "shares, one hundred and fifty dollars of which he "had received from his principals, but that he had "receipted for such certificates upon the books of "the company; that shortly afterwards the five "certificates were transmitted to him in North "Carolina, all five being made out in his name

" only; that he did not return either of them to
" the company, but immediately transferred each
" of the three in question to the party for whom it
" was intended; and that only one of the certifi-
" cates was ever transferred upon the books of the
" company.

" The Court instructed the jury to find for the
" plaintiff, and the defendants excepted. The jury
" returned a verdict in favor of plaintiff for
" $9,508.75, ' of which $7,500 is principal, and
" ' bears interest from June 1, 1885,' upon which
" judgment was rendered and a writ of error prose-
" cuted to this Court."

It appears from such statement that Hawkins never intended to become a stockholder for more than fifty shares, and that, at the time when he subscribed, he so informed the person having charge of the subscription books and had it noted on those books, and also promptly so informed the Board of Directors of the company as soon as the company was organized. Undoubtedly, as between himself and the company, he never was a stockholder for more than fifty shares. But, by mistake of the company and against his own explicit instructions, he was placed upon the stock-books for 250 shares, and was sent certificates for the same; he never returned to the company the certificates as to which the mistake was made; never did anything as to the company to have the 200 shares removed from his name on the books. Like the present defendants, however, he assigned (and, so far as his own act was concerned, transferred) all the 200 shares to the other persons (retaining only the 50 shares for which he was in reality a subscriber), and 50 of the shares he assigned were actually transferred from his name upon the books, as in the present case 100 shares were transferred from the firm name of these defendants on the books. Here

is what this Court (131 United States R., 335) said upon that state of facts:

> " Defendant claims that, of the two hundred and
> " fifty shares for which he subscribed, he took one
> " hundred and fifty shares for three other persons.
> " The stock ledger shows that five certificates of
> " fifty shares each were sent to defendant, made
> " out in his name; and it appears from his evi-
> " dence that he transferred three certificates for
> " fifty shares each to Hoge, Battle and William-
> " son, though they failed to have them transferred
> " to their own names on the books of the company.
> " Of the remaining one hundred shares, defend-
> " ant retained fifty and transferred the other fifty
> " to five other persons whom he had anticipated,
> " when he subscribed, might take them. So far as
> " appears from the stock register, the plaintiff re-
> " mained the original owner of two hundred shares
> " and the assignor of fifty, and no error is assigned
> " as to this fifty.
>
> " Section 25 of C. 57, Tit. 18 of the Code of Vir-
> " ginia of 1860 is as follows: ' A person in whose
> " ' name shares of stock stand on the books of a
> " ' company shall be deemed the owner thereof as
> " ' it regards the company ' (Code of 1873, Tit. 18,
> " C. 57, Section 27). So far as creditors were con-
> " cerned, Hawkins remained a shareholder as to
> " the two hundred shares *(Pullman vs. Upton*, 96
> " U. S., 328; *Richmond vs. Irons*, 121 U. S., 27;
> " *Upton vs. Tribilcock*, 91 U. S., 45). The judg-
> " ment of the Circuit Court cannot be disturbed
> " because the defendant was held liable on two
> " hundred and fifty shares."

It does not appear, from the foregoing, whether this Court placed its opinion upon the ground of estoppel, or upon the ground of ratification; nor does it appear

that either the company or the creditors did anything more because of the appearance of ownership of the stock on the books in the name of Hawkins than was done by the company or the creditors in this case because of the appearance of the shares here in question upon the books in the names of these defendants in error. But, without any proof that any creditor had given credit to the company because of the appearance of the stock in the name of Hawkins, it does appear that Hawkins was held bound as to the creditors for the whole 250 shares —and obviously upon the general rule that creditors are conclusively presumed to have given credit to the company upon the faith of the names of the persons appearing as stockholders upon its books. If there be any difference between that case and this, the difference is against the defendants, who, unlike Hawkins, did not inform the company that they were not purchasers of the stock in their own right, but allowed the company, its trustees and creditors, to remain in ignorance of the alleged fact on which they have relied in this litigation until after the company had passed into liquidation.

POINT VII.

The motion to dismiss the writ of error, and also the motion to affirm, should be denied. And, as the whole case has been discussed on the merits, and defendants in error have, by their motion to affirm, submitted the merits to be now determined, the judgment of the Supreme Court of the State of New York and judgment of the Court of Appeals of that State (Green vs.

Van Buskirk, 3 Wall., 450), here complained of and brought for review, should be now reversed, with directions to said the Supreme Court of the State of New York to enter judgment upon the verdict rendered March 25, 1890, in favor of plaintiff and against the defendants David J. Garth, Robert A. Lancaster and Samuel J. Harrison, who are here defendants in error, with costs, and to proceed thereon as by law required, with execution, or this Court should now itself enter such judgment on that verdict.

POINT VIII.

The two years prescribed by the Act of Congress (Section 1008, Revised Statutes) **within which a writ of error may issue from this Court to bring up the record of a judgment in a State court has not yet expired in this case; the judgment in the record now at bar** (fols. 163, 164) **is only for dismissal of the complaint, and for about $2,500 of costs, to be paid by plaintiff in error, a trustee for the benefit of creditors, out of the trust fund; and, under those circumstances, if any irregularity is found by this Court, which requires that the motion to dismiss be granted, whilst the motion to affirm is denied on the merits, the order granting the motion to dismiss the writ should be with leave expressly granted to plaintiff in error to apply,**

within a time to be fixed, to a Justice of this Court for another writ of error. Such leave should be with an order of the Court granting supersedeas on the security taken when the present writ was allowed (fols. 182, 183), **or with an order to show cause why such supersedeas should not be granted, and such order to show cause should be accompanied by a stay of all proceedings by defendants in error, meantime, on the judgment here complained of.**

Dated New York, December 15, 1892.

Respectfully submitted,

BURTON N. HARRISON,

Of Counsel for Plaintiff in Error.

147 U. S. 360

Office Supreme Court U. S.
FILED.
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CLERK.

IN THE

Supreme Court of the United States.

JOHN GLENN, TRUSTEE OF AND FOR THE BENEFIT OF THE CREDITORS OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

DAVID J. GARTH, ROBERT A. LANCASTER, AND SAMUEL J. HARRISON, DEFENDANTS IN ERROR.

BRIEF OF JOHN HOWARD, OF COUNSEL FOR PLAINTIFF IN ERROR, ON THE MOTION TO DISMISS OR AFFIRM, IN REPLY TO BRIEF OF MESSRS. CLOPTON, HARRISON, AND ABNEY, FOR DEFENDANTS IN ERROR.

J. L. HILL PRINTING COMPANY, RICHMOND, VA. 17388

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For convenience, it is proposed, in natural, though not in numerical order, to notice, first, the first and *third* grounds of the motion to dismiss (pp. 7–13 and pp. 24–27 of Brief), which do not go to the merits, and then to consider the second ground (called the first, pp. 13–21), upon which is based the motion to dismiss, and also a motion to affirm upon the merits, and which involve the real questions at issue.

I. OF THE NATURE OF THE JUDGMENT SOUGHT TO BE REVIEWED.

It seems to be contended (brief of opposite counsel, pp. 7, 8), *first*, that the judgment of the Supreme Court of New York

entering as its own the judgment of the Court of Appeals, is absolute and final, but that it is not subject to a writ of error from this court, because the right to the writ has been waived by stipulation of the plaintiff's counsel; and *secondly*, that the said judgment is *not* final, because an order for a new trial is not a final judgment. (Brief, pp. 11–13.)

The inconsistency of these contentions is obvious (since it is impossible that a judgment should be final and *not* final at the same time and for the same purpose), but neither, it is submitted, has any foundation in fact.

Undoubtedly the judgment of the Supreme Court of New York, entering as its own the judgment of the Court of Appeals, is, to all intents and purposes, a final judgment, and a final judgment of the highest court in the State in which a decision could be had. By the positive statute of New York, cited and relied upon by opposite counsel, it forever ended and concluded the matters in controversy between the parties in that action, so far as the courts of New York were concerned, and beyond such a degree of finality there is nothing known to the law. It is so conceded to be by opposite counsel, and New York decisions are referred to them to that effect. (Brief, pp. 8–11.) Hence the writ of error was with propriety directed to the court in which that final judgment was entered; the court to which the Court of Appeals had sent its judgment and record, in accordance with the laws and practice of the State, there to remain, and no other court could have made return to the writ by sending up to this court a copy of the judgment and record, or could enter a judgment either of affirmance or of reversal by this court. (*Atherton* v. *Fowler*, 91 U. S. 143, 146, 147; *Polleys* v. *Black River Co.*, 113, U. S. 81, 82.) The judgment was as final as that in *Phila. Fire Association* v. *New York*, 119 U. S. 110, 114, and as in that case, so in this, the writ was directed to the Supreme Court of New York as the highest court in the State in which a decision could be had, and the court to which the judgment and record of the Court of Appeals had been sent, and in which they remained.

It is true that the judgment of the general term, affirmed by the Court of Appeals, was that a new trial be granted. (Page 156.) But by stipulation of the plaintiff's counsel, on giving notice of an appeal to the Court of Appeals made under the New York statute, if the order appealed from should be affirmed, it was agreed that judgment should be rendered absolute against the appellant. (Page 157.) And the Court of Appeals did "order and adjudge that the order of the general term be and the same is hereby affirmed, and judgment absolute ordered for the defendants, with costs. And it was also further ordered that the record aforesaid and the proceedings of this court be remitted to the said Supreme Court, there to be proceeded in according to law. Therefore it is considered that the said order be affirmed and judgment ordered for defendants, and costs as aforesaid." (Pages 162–163.) Accordingly, when the record and the *remittetur* came down to the Supreme Court on the 7th of May, 1892, it was by that court "ordered and adjudged that the judgment of the said Court of Appeals be and the same is hereby made the judgment of this court, and that the defendants and each of them have execution against the plaintiff for the costs, when adjusted by the clerk and reported in this judgment, and that this order be annexed to the judgment roll," which was done, and the judgment enrolled. (Pages 163–4.) That, however, was an *ex-parte* judgment as to costs, and on motion the judgment was, on the 29th of June, 1892, so modified as to allow only one bill of costs, but otherwise undisturbed. (Pages 165–6.) From that judgment no writ of error or appeal lies to the Court of Appeals or to any other New York court. But though partly in form a judgment for a new trial, it was in substance and legal effect much other and much more. After such a judgment no new trial takes place, or can take place, but "the judgment is rendered *absolute* against the appellant upon the whole matter and right in controversy." (*Hiscock* v. *Harris*, 46 N. Y. 402.) And so all the New York cases hold. (See *Lanman* v. *Lewiston R. R. Co.* 18 N. Y. 494–5; *Godfrey* v. *Moses*, 66 N. Y. 250; *Lake* v.

Nathans, 67 N. Y. 589, 590; *Roberts* v. *Baumgartes*, 126 N. Y. 336.) This case, therefore, is clearly within the rule that a judgment of reversal is final when it enters or directs the entry of a judgment which disposes of the case. (*Smith* v. *Adams*, 130 U. S. 168.)

But it is equally clear that the judgment was final only as to the New York courts.

The object of the statute authorizing such a stipulation and such a judgment as were had in this case, and the class of cases in which it may properly be availed of, have been plainly pointed out by the New York Court of Appeals: "This provision," say that court, "was intended to meet that class of cases where the party prevailing at trial is satisfied either to sustain his verdict by the judgment of this court or fail altogether in his action or defence. It embraces a large class of cases in which a new trial can only be a useless expense, because the whole merits are presented and disposed of by the decision of the question of a new trial. Its terms are rigid for the very purpose of confining appeals from orders granting new trials to the class of cases mentioned, and it is only in that class of cases in which the merits are all presented on a motion for a new trial that this sort of appeal can be safely brought." (*Lanman* v. *Lewiston R. R.* 18 N. Y. 494–5.)

So in *Cobb* v. *Fenton*, *supra*, the Court of Appeals said: "An appeal from an order granting a new trial, with the stipulation required of a judgment absolute in case the order is reversed, is only proper and admissible when the *sole* question that can be presented upon the record relates to and will determine the merits of the controversy, and cannot be obviated by a second trial. When there are exceptions which, if sustained, will entitle the successful party to a new trial, but the decision of which will not necessarily determine the merits, the exceptions must be clearly frivolous to justify the hazard of such an appeal." (*Cobb* v. *Fenton*, 46 N. Y. 533, 538.)

In the opinion of the counsel for the appellant in this case, it was precisely a case of the class above described, in which

the whole merits were presented and must be disposed of by the decision of the question of a new trial, and the exceptions taken in the progress of the trial were frivolous, save as to the one only point to be adjudicated, namely, whether under the statutes and the jurisprudence of Virginia governing the corporation in question, with reference to which statutes and jurisprudence all dealings in the corporate stock were had, the defendants were, upon the facts appearing in the record, in legal sense stockholders of the corporation so far as its creditors were concerned, and were bound as such by the judicial proceedings in Virginia, by authority of which the plaintiff in error, as trustee for the creditors, had brought this action.

All other questions raised had been so frequently and fully adjudicated in favor of the plaintiff by numerous high courts, State and Federal, in the course of this multitudinous litigation, that, in the opinion of his counsel, it was even vexatious to seek to present them again for adjudication, and in that opinion they were assuredly well fortified by the elaborate judgments of this court in *Hawkins* v. *Glenn*, 131 U. S. 319, and *Glenn* v. *Leggett*, 135 U. S. 533, recently followed and affirmed in *Glenn* v. *Marbury*, 145 U. S. 499, in which the court said, on page 506, that since those decisions the only questions open for consideration in that case were the statute of limitation and the right of the plaintiff to bring the action in his own name—questions which were of no moment in the present case. For it having been settled by a long and unbroken series of decisions in this litigation as elsewhere that limitation does not begin to run on stock subscriptions until a call is duly made, the action was undoubtedly brought in ample time under the New York statute of limitations, and by authority of statute in that State, as held in *Toronto Trust Co.* v. *The Chicago R. R. Co.*, 123 N. Y. 37, the action was rightly brought in the plaintiff's name. And certainly those questions were not regarded with any apprehension by the plaintiff's counsel, or of such importance or difficulty as to prevent the adoption of the mode of appeal which was taken. The great, and in fact the only arguable

question (if, rightly considered, that was arguable) was the question which has been stated.

The trial court had held that under the statutes and the jurisprudence of Virginia governing this corporation, subject to which all dealings in its stock were had, and the facts shown in the record, the defendants were stockholders so far as the creditors were concerned, and were bound as such in this action, and when the General Term held otherwise it was thought entirely safe to bring that question to the Court of Appeals in the speedy and inexpensive mode adopted, together with such other—but unimportant—questions as arose upon the record as it stood. It was of course known that, under the New York statute authorizing that procedure, if the General Term were sustained judgment absolute would be entered by the Court of Appeals against the plaintiff, which, when entered as its own by the General Term, would become final and end the controversy between the parties to the action so far as the New York courts were concerned. But it is a great mistake to suppose that it was either the object of the statute providing for such absolute and final judgment by stipulation of the appellant, or the intention of parties by entering into such a stipulation and in waiving a new trial in the ordinary course, and appealing at once upon the law and the facts as disclosed by the record, to effect or do more than to avoid the useless expense, trouble, and delay incident to a formal new trial, by which, in the opinion of counsel, the result could not be changed by additional or other evidence, and to reach a final judgment upon the record as it was made. As above shown by the decisions of the New York Court of Appeals such was the only object of the statute, and obviously it had reference only to final litigation in the New York courts, which it was designed to facilitate and expedite at reduced expense, for it made no allusion to the appellate jurisdiction of this court, which the Legislature of New York had, in fact, no power to regulate or take away, but which was conferred and is regulated and secured by the Constitution and laws of the United States. It is a familiar rule that statutes must be

construed with reference to the subject-matter. The subject-matter here was final litigation in the courts of New York, and appropriate provision was made therefor. And though it may be true, as held in *Roberts* v. *Baumgartner*, 126 N. Y. 340, that a party for a consideration may waive his legal privileges as to a mode of procedure, yet the waiver can reasonably be construed as extending only to the privileges extended—namely, to proceedings in the New York courts. Another familiar rule is that in the construction of statutes we must look to the evils designed to be remedied for the scope of the remedy applied. The evils designed to be remedied here were the delay and expense of needless new trials in the New York courts, and the remedy provided was an easy and expeditious mode of reaching a final judgment at diminished costs. Still another familiar rule is that "a thing may be within the letter of a statute and yet not within the statute, because not within its spirit, nor within the intention of its makers, as shown by the circumstances of its enactment, or the absurd results that would follow from giving such broad meaning to its words." (*Holy Trinity Church* v. *United States*, 143 U. S. p. 459 *et seq.*) And it would be ridiculous to suppose that by simply providing a mode for reaching final judgments in the courts of a State with celerity and economy in substitution of the tedious and expensive procedure of new trials and successive appeals, it was intended in any manner to disturb the jurisdiction of the Supreme Court of the United States in review of final judgments so obtained, when federal questions were presented by the record. The only operative effect rather of such swift mode of reaching final State judicial action on questions of that character was to facilitate and expedite their cognizance and decision by the Federal Supreme Court, by speedily placing them in the necessary position for that purpose, and it would be strange if the jurisdiction of this court were taken away or destroyed by the very means adopted to bring it into activity.

Whether, indeed, the Legislature of New York had power,

as a condition precedent to the obtaining of speedy final litigation in the courts of that State, to require citizens of other States, and thus citizens of the United States, to waive their constitutional right of invoking the jurisdiction of the National Supreme Court in correction of the possible errors of those courts in denying to such citizens rights guaranteed by the National Constitution and laws, would present a very grave question, had any attempt been made to exercise so extraordinary and dangerous a power. Kindred attempts at exclusive jurisdiction in the State courts have uniformly failed. (*Clark* v. *Bevar*, 139 U. S. 102, 103, and cases cited; *Ins. Co.* v. *Morse*, 20 Wall, 450; *Board of Commissioners* v. *Lucas*, 93 U. S. 108; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 538; *Kern* v. *Huidekopper*, 103 U. S. 492.) But in the utter absence of any evidence of such an attempt, in legislation silent upon the subject, and reasonable and appropriate only as applied to litigation in the State courts, for which it was in terms intended, it would not be respectful to that great State to impute to it such a purpose. And, *a fortiori*, in entering into a stipulation under the New York statute with reference to final litigation in the New York courts, it was not and could not have been the intention or understanding of the plaintiff, a citizen of Maryland, that he was thereby to waive or release any right conferred upon him and the large interests committed to his charge by the Federal Constitution and laws. When success in the litigation he was prosecuting in the New York courts depended fundamentally upon the faith, credit, and effect which should be given by those courts to the public acts of the Legislature of Virginia and the judicial proceedings of a Virginia court, under which his rights of recovery arose, and upon which they were thus based, to suppose that he or his counsel intended by the stipulation in question to surrender those rights to the judgment or caprice of the State courts of New York, in exclusion of the appellate jurisdiction of *this* court, created and organized for the express purpose of supreme guardianship, protection, and enforcement of just such rights, would be to imagine a degree of recklessness and fatuity on

their part of which it is hoped little evidence elsewhere appears in the record.

It is far more reasonable to infer that as this court had repeatedly adjudicated the validity of the proceedings in the Virginia court, and incidentally the credit and effect due thereto, and to the public statutes of Virginia involved in the litigation, the counsel for the plaintiff having carefully prepared the case as it stood before the trial court upon the merits, and perceiving no advantage to be gained by a new trial upon the same or other obtainable evidence, should the law be adversely adjudicated by the appellate court, entered into the stipulation for the objects contemplated by the statute under which it was made, namely, to expedite a final judgment in the State courts, at the least expense, and that this was done with an ultimate view to the appellate jurisdiction of this court, should its invocation become necessary. And, accordingly, when the final adverse judgment was entered in the Supreme Court of New York on the 29th of June, 1892, the plaintiff in error, with all convenient speed, and doubtless as soon as a copy of the record could be obtained, to-wit: on the 24th of August, applied for and obtained a writ of error from this court, which with a copy of the record was promptly filed. (P. 165, p. 4, p. 177.) And since, as will hereafter be fully shown, nothing could be clearer than the jurisdiction of this court in the premises, so it is now submitted that nothing could have been more appropriate or less open to criticism than the prompt action of the plaintiff in invoking that jurisdiction, for which the absurdly untrue sug gestions are made by opposite counsel that it was taken because of want of funds to pay the costs below, and merely for delay. The records of this court demonstrate that the activity and perseverance exhibted in this case are only in keeping with the unwearied diligence illustrated by the plaintiff in prosecuting or defending similar suits in this vast and varied litigation alike in State and Federal courts, both of original and appellate jurisdiction, and with an uniformity of success, upon the merits, without a parallel.

II. The Writ was Properly Granted.

Of a piece with the ground to dismiss which has been examined is the third ground, namely, that the writ was not granted by competent authority under the act of Congress providing that "the citation shall be signed by the chief justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of." But Mr. Justice Patterson attached the following distinct and clear certificate to the writ, stating in substance the constitution of the court which rendered the judgment, in which he was sitting as chief judge or presiding justice, and the facts constituting him such chief judge or presiding justice, which shows a full and complete compliance with the act:

"The foregoing writ is hereby allowed. (There is no chief justice or presiding justice of the Supreme Court of the State of New York, though there is a presiding justice of the general term of said court in each of five judicial departments. The presiding justice of the first department, which consists of the city and county of New York (being coextensive with the first judicial district), is now absent from the State, and I am the only justice of the court now sitting or assigned to sit within said judicial district. The judgment complained of by the plaintiff in error is a judgment entered by direction of the court at special term in the first judicial district on a *remittitur* from the Court of Appeals. I am now the justice presiding at such special term of the court, to which I have been regularly assigned, and with all the powers of such a justice.)

"Edw'd Patterson,

"Justice Supreme Court of the State of New York,

"presiding at special term this 24 day of August, 1892."

(Pages 3, 4.)

Under the decision of this court in *Buller* v. *Gage*, 138 U. S. 53, the foregoing certificate must be accepted as a true statement of the facts showing that the writ was properly granted

and issued. Every fact necessary to confer jurisdiction to allow the writ is affirmatively shown by the certificate, for thereby it is shown that not only was Mr. Justice Patterson the chief and presiding judge of the court in which the final judgment was entered, but that in point of law and fact he was the only acting judge of the court at the time, and himself constituted the court and judicially acted as such under the laws of the State and the constitution of the court. And it is obvious that if the writ of error is a nullity because it was granted by Mr. Justice Patterson at a special term held, as alleged, at chambers, but which does not so appear by the record (pp. 3–4), the judgment itself was an equal nullity for a like reason; since it was entered in the first instance by Mr. Justice Ingraham, sitting alone at a special term held at chambers (p. 164), and was corrected and re-entered as corrected by Mr. Justice Andrews, sitting in like manner at special term held at chambers (pp. 165–6). The truth, doubtless, was that each judge was acting judicially and officially, with all the powers of the court in accordance with the laws of New York and the constitution and practice of the court, and certainly this was true as to Mr. Justice Patterson, as plainly appears by his official certificate. The case is much stronger than was *Buller* v. *Gage*, 138 U. S. 52, but is fully covered and governed thereby. In that case it was held that when a judge styled himself "presiding judge of the Supreme Court" of a State "it was to be presumed that he acted in that capacity in the absence of the chief justice and in accordance with the provisions of the constitution of the State, and that the writ was properly allowed." In this case there is no need for presumption upon the subject, for the facts affirmatively and distinctly appear by the record. Indeed, it thereby appears not only that the writ was properly allowed by Mr. Justice Patterson, as at that time, in the absence of the chief judge, acting as chief judge and presiding justice and constituting the Supreme Court then sitting, and with all the powers of that court, in which, as like constituted, the judgment had been rendered, but that he was then, as so acting, the only

judicial authority of the State by whom the writ could have been granted. For as the judgment and record of the Court of Appeals had been sent down to the Supreme Court, thereafter therein to remain, and the final judgment had been rendered by that court, Chief-Justice Earl, of the Court of Appeals, had nothing to do with the matter, and Mr. Justice Patterson, lawfully acting in the place of the chief judge of the Supreme Court, and in law and fact constituting that court, was exclusively the judicial officer empowered to allow the writ. And as it appears by the record that he was the presiding justice of the court at the circuit before whom and a jury the case was tried, and by whom the jury had been directed to find a verdict for the plaintiff, subject to exceptions, thus by such direction giving to the Virginia statutes, jurisprudence, and judicial proceedings involved the constitutional and legal faith, credit, and effect to which they were entitled, which ruling had been reversed by the general term, and the reversal affirmed by the Court of Appeals, it was with peculiar felicity of propriety that it fell to the duty of the only judge in the case who had respected and enforced the Federal rights of the plaintiff to grant him a writ of error by which those rights would be brought to this court for their efficient protection and enforcement.

III. Of the Federal Questions Involved.

This court has jurisdiction, and should reverse the judgment and enter judgment for the plaintiff in error.

In order to the existence of jurisdiction, under section 709 of Revised Statutes, while it is necessary that it should appear that a Federal question arose and was decided in the court below adversely to the Federal right claimed, it is not necessary that such should affirmatively appear, but it may be necessarily involved in the pleadings, proofs, and the decision rendered; and while if a Federal question do in any manner duly appear, and to have been so decided, jurisdiction will not arise if there be another distinct and independent ground for the decision broad enough to support it apart from the Federal question;

yet if the Federal question was the fundamental question in the case, was necessarily involved as such, and decided adversely to the Federal rights claimed, and the alleged separate ground of the decision be in fact colorable only, and insupportable except by rejecting the Federal rights involved, and superseding the same, the court will assume jurisdiction and maintain and establish the Federal rights thus ignored and superseded. Such seems to be the reasonable and settled result of the decisions of the court, and it is obvious that if this be not true the rights of citizens of the several States and of the United States under the Constitution and laws of the United States, involved in litigation in the State courts, and the jurisdiction of this court for their protection and enforcement, would be of little worth, and easily eluded and thwarted by ingenious evasions and plausible pretensions of decisions upon other questions than those really involved and wrapped up in those rights. And while the court has ever been careful, and even astute, not to assume jurisdiction when it did not appear, on the other hand, it has not been slow or derelict to assume and enforce its jurisdiction whenever in any manner it properly appeared, whether by direct and open averment and adjudication or by necessary intendment and implication; and it has yet to allow any ignoring, disregard, or evasion of a Federal question by a State court, under whatever plausible or other pretence of basing its decision upon other than such questions, to prevent the assumption of jurisdiction and its exercise for the purposes of justice. Some only of the cases need be cited. In *Kuakauna Co.* v. *Green Bay, &c., Canal*, 142 U. S. 269, the court said: "This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case. (*Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Armstrong* v. *Athens County*, 16 Pet. 281; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *Eureka Lake Co.* v. *Yuba County*, 116

U. S. 410.)" Thus in this last cited case it was held that "when the court may reasonably infer from the record in the case brought here by writ of error from a State court, that the Federal question raised here was necessarily involved in the decision there, the court will not dismiss the writ on motion to dismiss for want of jurisdiction, although it may not affirmatively appear that the question was raised there." (116 U. S. 410.) And in *Chapman* v. *Goodnow*, 123 U. S. 546, the court said: "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of the question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here."

It is submitted that it plainly appears by the record in this case that within the meaning of these decisions a Federal question arose, and was decided adversely to the rights claimed; that its adverse decision was necessary to the judgment rendered; that there was no distinct and independent ground for the decision apart from the Federal question, and that the alleged ground for the decision could arise or exist only by rejecting the Federal rights claimed, and was colorable merely. And we submit that this even affirmatively appears by the pleadings, the proofs, and the decisions itself.

STATEMENT.

And here, *in limine*, the case differs from *Chicago, &c., R. R.* v. *Wiggins Ferry Co.*, 119 U. S. 615, in this, that in this case all the laws and jurisprudence of Virginia applicable to the

controversy are proved and admitted by stipulation as matters of fact (see pages 56–66, where most of the statutes are printed, and page 155 for stipulation); but that case is most important as showing the degree of faith, credit, and effect to which, under the Constitution of the United States, the public acts of a State are entitled in every other State, and as an illustration of the manner in which questions as to the same may arise before this court. On page 622 the court say, by Mr. Chief Justice Waite:

"The railroad company set up in its answer, as a defence to the action, that it had no authority to make the contract sued on, and in support of this defence put in evidence its Illinois acts of incorporation. Without doubt the constitutional requirement, Art. IV, sec. 1, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. This is clearly the logical result of the principle announced in *Mills* v. *Duryea*, 7 Cranch, 481, and steadily adhered to ever since. The claim of the railroad company is that by law and usage in Illinois the operative effect of its charter is to make such a contract as that now sued on *ultra vires*."

The claim of the plaintiff in error here is, that as to persons dealing in the unpaid stock of this Virginia corporation, in whatever capacity or interest, whose names appear, in the usual course of business, upon its books as purchasers and holders of its stock, by the action of themselves or their agents, and who were accordingly accepted by the company as stockholders (whether with or without, but especially when), without any knowledge or notice as to the real owners, or equities as to the ownership, the operative effect of the charter of the company, under the statutes and jurisprudence of Virginia, was to make them stockholders as to the company and its creditors, and responsible as such, no matter what may have been the secret relations between themselves and third persons, as to the stock

involved; that the defendants in error were placed in this category by the undisputed facts appearing in the record, and that the court below did not give to the statutes and jurisprudence of Virginia, and to the judicial proceedings in Virginia, the faith, credit, and effect that they have by law and usage at home.

In three important cases (not to mention others), in which elaborate judgments were rendered, this court has had occasion to become familiar with the legislation and jurisprudence of Virginia involved in this litigation, and with reference to which, as held in those cases, all dealings in the stock of the National Express and Transportation Company were had. (*Hawkins* v. *Glenn*, 131 U. S. 332; *Glenn* v. *Liggett*, 135 U. S. 548; *Glenn* v. *Marbury*, 145 U. S. 506.) It will be only necessary, therefore, to make a brief summary of that legislation and jurisprudence, so far as the present case is concerned, to show that the rights asserted in his pleadings and proofs by the plaintiff in error were exclusively based thereon, and that the same were rejected by the court below, and that its judgment cannot be supported except by such rejection, and rests upon no other distinct and independent ground broad enough for its foundation.

On examination of chapter 56 and chapter 57 of the Code of 1860 (reprinted in the Code of 1873, as it was itself a reprint of the Code of 1849), it will be seen that general provisions are made for the organization and regulation of corporations and joint-stock companies, including the stock obligations and rights of stockholders, the evidence as to the company as to who are to be considered stockholders, or to be recognized and treated as such, and the transfer of unpaid (as well as paid-up) stock, with its legal incidents and the responsibilities of transferror and transferree, and that the whole system contemplates the keeping of corporate books of the stock, which are to be the guide of the corporation in determining the corporate membership and their consequent rights and obligations. (Code of 1860, or of 1873, chapter 57, sections 1, 2, 3, 4, 5, 6

7, 9, 10, 11, 15, 19, 21, 24, 25, 26, 27, 28, 29. See record, p. 155.)

Thus, by section 3 of the Code of 1873 it is provided that "there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors," an obligation to which of course every purchaser of unpaid stock succeeded, and which by the purchase he assumed to meet (*Sanger* v. *Upton*, 91 U. S. 63, 64); by sections 6 and 7 books of subscription are provided and directed to be kept open for the time specified; by section 21 "a book shall be kept by the company in which shares may be assigned"; by section 23, if the money due on shares be not paid as required by the president and directors, it may be recovered by action or motion, or such shares, after notice, may be sold and transferred to the purchaser; by section 26, "no stock shall be assigned on the books, *without the consent of the company*, until all the money which has become payable thereon shall have been paid, and on any assignment the assignee and assignor shall each be liable for any instalments which may have accrued or which may thereafter accrue"; by section 27, "a person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof as respects the company"; by section 28, there shall be issued "to each person appearing upon the books of the company as owner of any shares of stock fully paid on a certificate of such shares under the seal of the company"; by section 29, "if any such person shall, for valuable consideration, sell, pledge, or otherwise dispose of any of his shares to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books, the title of the former (both at law and in equity) shall vest in the latter so far as may be necessary to effect the purpose of the sale, pledge, or other disposition, not only as between the parties themselves, but as to the creditors of and subsequent purchasers from the former, subject to the provision of the 26th section," requiring the consent of the

company to the assignment of unpaid stock, and holding the assignors and assignees equally and alike liable for the payment of past and future instalments; and by section 30, "the person to whom such certificate may be issued may return the same to the office of the company, and in person or by an attorney under a power of attorney for him assign on the books of the company either the whole number of shares mentioned in such certificate or a less number. The certificate so returned shall be cancelled and filed in the company's office, and therefor so many new certificates shall be issued, and to such person or persons, as may be proper in the case."

The foregoing are the provisions which affected the purchase and transfer of the stock in this case. A glance at these statutes, which enter into every act of incorporation of a Virginia joint-stock company, is sufficient to show that as to the transfer of stock two different classes of cases are provided for: 1. Paid-up stock, which by section 28 is transferrable upon the books of the company at the pleasure of the holder; 2. Unpaid stock, which by section 26 is transferrable upon the books only with the consent of the company, previously obtained, and only then upon condition of paying up any instalments in arrear, and subjecting alike the assignor and assignee to the payment of any future instalments that may be called for; and upon the further conditions, that though the transfer may be valid as between the transferror and transferree, both at law and in equity (section 29), the transfer bears with it the inherent legal incidents of equal obligation on each of them for future instalments (section 26), and *that as to the company*, "a person in whose name shares of stock stand on the books shall be deemed the owner thereof."

It is impossible not to see that, of these statutes, whether taken separately or as a whole, the operative effect is radically to change the common law as to the purchase and transfer of unpaid stock and the rights and liabilities of the vendors and the purchasers, and the rights of the company and its creditors. By the common law, as is well known, the *bona fide* and abso-

lute transfer of unpaid stock even to a man of straw, and in the known failing circumstances of a company, operated as a complete *novation* alike as between the transferror and the transferree and the company itself and its creditors, and the man of straw was alone held bound for the payment of the stock obligations. The company and its creditors had no voice in the matter, and the transferror went "scot free," and the company and its creditors were of course deprived of the fund, which as capital stock had been subscribed as the foundation of the corporate business and as a trust fund for the payment of the corporate creditors, upon the faith of which credit had been and was to be given to the company. (Thompson's Liability of Stockholders, chapter XIII, sections 1 and 2; Lowell's Transfer of Stock, chapter IV, sections 80 and 81).

The leading object and effect of the foregoing provisions of the Virginia statutes is apparent. It was thoroughly to eradicate, abolish, and set aside the whole common law in respect of the purchase and transfer of unpaid stock, so far as Virginia corporations and joint-stock incorporated companies were concerned. Thus, by section 26 it was made alike the right, the duty, and the interest of every assignor of unpaid stock to see to the solvency and responsibility of his direct assignee, inasmuch as that all assignments would be at the peril of the assignor, who was held liable for all past and future instalments, just as if no assignment had been made. And so, although assignments were by section 27 rendered valid *inter partes*, and perhaps even assignments in blank were possible, yet by section 26 every assignment was subject to two conditions, to-wit: (1), the consent of the company who thus acquired a direct right, interest, and duty to see to the solvency and responsibility of the transferree, alike for the protection of itself and its creditors, before consenting to the transfer; and (2), by section 25, that the persons in whose names the stock stood upon the books of the company were to be deemed the owners thereof, as to the company, and as to the company assignments in blank passed no title, were un-

known to its books, and in fact were legal impossibilities. Nothing could operate a more simple, certain, and complete extirpation and sweeping away of the whole body and doctrine of the common law, as to the transfer of unpaid stock, in respect alike of the transferrors and the company and its creditors. And the legal operation and result, as was the design of this unique, wise, and just system of legislation, in substitution of the common law, was to create and secure a fixed and certain trust fund for the corporate business and the payment of creditors, from the first creditor to the last, ever increasing in strength and solidity by the successive assignments of unpaid stock upon the books of the company, with its consent, as each successive assignment made the assignor and assignee alike responsible as well for future as for past instalments, and added a new element of safety to the fund. Indeed, each assignment, if not an actual increment of the fund, operated as a substantial barrier against its loss and an additional guarantee and security for its payment. It was in legal effect in the nature of a new authorized issue of stock, and enured to the benefit of all the corporate creditors alike, past and future, in respect of which this court said, in *Handley* v. *Stutz*, 139 U. S. 436, as to the class of creditors affected by the new issue: "The real question in this connection is, When it may be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously, when such increase was ordered. That is a fact to which publicity would naturally be given. The creditors could not be expected to know when and by whom such stock would be taken. It is true they assume the risk of the stock being taken at all, but the moment shares are taken they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment not only of future but of existing creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock,

would in a case like this, where the creditors and stockholders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties." In which connection it may be pardoned to refer to a learned work to the same effect previously cited. (Lowell's Transfer of Stock, section 82, page 85.)

In the present case, by the very constitution and organization of the company all persons dealing in its unpaid stock had notice upon the face of the laws of Virginia composing its charter, referred to upon the face of each certificate of stock itself (Record, p. 128), that upon all assignments of the stock the assignor and assignee were each and all to be responsible for all past and future instalments, in order to establish and insure the payment of the subscribed capital stock in the interest and accomplishment of the corporate business and for the satisfaction of the corporate creditors at large, from the beginning of the business to its end, and that for those purposes registry was required upon the books of the company, with its consent previously obtained, as necessary to the validity of the transfer, so far as the company and its creditors were concerned. And obviously it was not intended that any particular creditor should be compelled to search the records and registry of the company, and look to discover and see whose names appeared as stockholders at any particular time, whether as an original subscriber or as an assignor or assignee, but that the whole machinery of the corporate organization, stock obligations and provisions for their payment, contemplated and constituted the creation, establishment, and enforcement of a general trust fund for the purposes of the corporation and the payment of its creditors, one and all, at large, at whatever time the debts were contracted. In this general view, it was clearly not the purpose of the requirements of the statutes, in respect of the transfer of unpaid stock and its registry upon the books, merely to ascertain who were entitled to vote at meetings of the stockholders, and to whom dividends should be paid in the ordinary administration of the corporate affairs, but it was to show and

make plain and certain who were to be held liable as stockholders in respect of the company and its creditors, and to prevent speculative, simulated, and fraudulent dealings in and transfers of unpaid stock, to the diminution and destruction of the lawful assets of the company, and to constitute each transfer an additional muniment of corporate solidity and security for the payment of the subscribed capital, and itself equivalent to a new subscription or addition to the capital stock by binding every new member of the corporation for the payment of the original issue of stock, and thus to cut up by the roots the common law facilities and evasions by which unpaid stock could be handed and bandied about in the brokers' market as "foot-balls" (see *Upton* v. *Sanger*, 91 U. S. 48) by the delivery of certificates in blank, and powers of attorney of transfer in blank, thus permitting any part or the whole of the subscribed capital to be lost in frustration of the corporate objects and in fraud of the corporate creditors.

Of course the foregoing statement as to the liabilities of actual dealers in the unpaid stock excludes the case of a person whose name appears upon the books, but who claims never to have had any dealings in the stock and to be a stranger to the company. In such cases the common law rules applies as recognized by this court in *Turnbull* v. *Payson*, 95 U. S. 418; by the Court of Appeals of Virginia in *Vanderwerker* v. *Glenn*, 85 Va. 14, and by the Supreme Court of North Carolina in *Glenn* v. *Orr*, 96 N. C. 413, that a person whose name appears upon the register of stockholders of such a company is *prima facie* a stockholder, and the reasons therefor are well given by the North Carolina court, pp. 415, 416.

But while in a general way that rule was applicable and might well have been applied in this case to show, in the first instance, that by the appearance of the names of the defendants in error upon the books of the company as stockholders, they were *prima facie* to be held as such; yet that was a mere common law legal presumption, or inference and incident of such appearance, and had nothing to do (except as such ancillary

and independent initiatory evidence tending to show membership) *with the statutory rights and obligations of actual dealers in the stock* whose *names appeared upon the books as holders of stock with their knowledge and without dissent on their part, so far as the company and its creditors were concerned.* As will hereinafter be seen, the court below failed to perceive, or, if it perceived, did not regard the distinction, and confounded the two broadly and radically different things, and went off upon the common law rule of evidence as to the appearance of stock upon the stock-books, in respect of strangers, and utterly ignored and rejected the constitutional credit and effect due to the said statutes of Virginia in respect of persons actually dealing in such stock, and whose names appeared upon the books of the company as holders and owners of stock in the ordinary and regular course of its business as conducted under those statutes.

Add now two other elements entering into the constitution of this company, and its legal nature and attributes will be complete. The first is, that for the purpose of winding up its affairs and paying its debts, it can never die, and exists forever, with all its corporate powers in full force and vigor. (Chapter 56 of the Code of 1860 (or 1873), section 31; *Hambleton* v. *Glenn*, 85 Va. 905; *Hawkins* v. *Glenn*, 131 U. S. 331.) And the second is, that it is always serviceable with process—if not upon an officer, then upon an agent, and if not upon an agent, then by order of publication of the writ. (Code of 1860 and 1873, chapter 166, sections 7 and 11.)

Thus, for the purposes of the conservation and realization of the original capital subscribed, which was ample for all its corporate objects, this company, by the compulsory law of its being, was endowed with an immortality of honesty and justice. And of its vain attempt at suicide by the abandonment of its business and all of its obligations to itself and to its creditors, it might well say with Manfred, when standing upon the mountain of the Jung Frau and struggling to leap into the abyss below:

"There is a power within me which withholds,
And makes it my fatality to live:
If it be life to wear within myself
This barrenness of spirit, and to be
My own soul's sepulchre, for I have ceased
To justify my deeds unto myself—
The last infirmity of evil."

In the unpaid stock of such a company business men might well deal for the legitimate corporate purposes, with an assurance of success in the enterprise, if judicious in itself and properly conducted upon the basis of the corporate organization. But nothing could be more dangerous as to brokers and speculators in such stock upon the basis of the common law and its customs, which have been effectually extirpated and extinguished by the Virginia Code in respect of stock in Virginia corporations; and some of such dealers in the very batch of stock involved in the present case have found out to their cost the radical difference between the two systems of jurisprudence. (*McKeen & Co.* v. *Glenn*, 66 Md. 479, 482; *Hambleton & Co.* v. *Glenn*, 72 Md. 331.)

In the fall and early winter of 1865–'66, upon the basis of the Virginia Code, this company was chartered, organized, and commenced its extensive operations with an authorized capital stock of $5,000,000 (of which over $4,000,000 was subscribed), divided into shares of $100 each, of which $2 per share was to be paid at the time of subscribing, and the balance as called for by the president and directors, which shares were assignable as to the company only upon its books, and with its consent, and upon every assignment the assignor and assignee were each to be liable for any instalments that might be called for, and the persons in whose names the stock stood upon the books of the company were to be the owners thereof as regarded the company. In the course of its business many current debts were of necessity contracted to its army of officers and employees, to the railroads carrying its freight, to banks discounting its notes or calls for instalments, to individuals lending it money, and for large, varied, and ever-increasing daily ex-

penses in the administration of its operations—national in name and in aspiration. And of course many sales and assignments were made of the unpaid stock of so hopeful and brilliant an enterprise, then without competition in the Southern States and favorably considered and patronized from New York southward, and many of those assignments were doubtless made, as usual in such cases, to or for brokers and speculators in stock. While in the full tide of apparent success, the company found itself embarrassed, and on the 20th of September, 1866, executed a general deed of trust conveying, for the benefit of all of its numerous creditors, all of its assets, especially including the unpaid stock obligations, and on the 1st of November, 1866, abandoned its business and its organization, and neither its stockholders or its directory ever held another meeting.

As the unpaid subscriptions and stock obligations passed by the deed, "the creditors," as this court said in *Hawkins* v. *Glenn*, 131 U. S. 333, "were limited to the relief which could be afforded under it." That relief by the proceedings and decrees was had of the Virginia court on the creditors' bill of Glenn and others against the company and the trustees in the deed, with which this court is familiar, and which may be found fully stated in *Lewis* v. *Glenn*, 84 Va. 947, and in the judgments of this court in *Hawkins* v. *Glenn*, *Liggett* v. *Glenn*, and *Glenn* v. *Marbury*, above cited. It is sufficient here to say that the general result was that validity of the deed was established; that it was held to have conveyed all of the unpaid stock obligations; that it ascertained the debts of the company secured by the deed; that it held that the corporation was in full legal existence for the purposes of the suit, and had been duly served with process in the suit; that the deed was in full force and vigor as a security for the debts, and that calls were made of the remaining 80 per cent. of the unpaid stock upon "the stock and stockholders, and each of them, and their legal representatives and assigns," which the plaintiff in error, as substituted trustee, was authorized and directed to collect by suit or otherwise, and in such jurisdictions as he might be advised. (See the opinion and

decree of the Chancery Court of Richmond of the 14th of December, 1880, pp. 91–96, and pp. 86–89, and the decree of the Circuit Court of Henrico (to which the suit had been removed) of the 26th of March, 1886, pp. 109–110.) The validity and binding effect of those proceedings and decrees, as to the company, its trustees, and its stockholders, were established by the Supreme Court of Appeals of Virginia in *Lewis* v. *Glenn*, 84 Va. 947; *Vanderwerker* v. *Glenn*, 85 Va. 9, and upon a direct attack in *Hambleton* v. *Glenn*, 85 Va. 901, all of which cases have been recognized by this court in the three cases cited *supra* as adjudicating the faith, credit, and effect to which the said judicial proceedings in the Richmond Chancery Court are entitled by law and usage in the State of Virginia. And as to such a deed, whose legal validity and effect were thus adjudicated, this court has itself recognized and adjudicated as the law and usage in Virginia that the trustees and the creditors secured by the deed are purchasers for value, and if taking without notice of equities, take a good title against the world. *Peters* v. *Bain*, 133 U. S. 672, in which on page 696 the Court say: "It is well settled in Virginia that the trustees and beneficiaries in a deed of trust to secure *bona fide* creditors occupy the position of purchasers for a valuable consideration (*Wickham* v. *Lewis Martin*, 13 Grat. 427; *Evans* v. *Greenhow*, 15 Grat. 153, 156; *Kerner* v. *Triggs*, 98 U. S. 50, 53);" and the only reason why the established jurisprudence of the State was not applied in that case was that upon the record the trustees appeared to have been affected with notice of outstanding equities in third parties, of which, as will be shown, there can be no pretence in this case. Perceiving, upon an examination of the corporate books of this company, that the defendants in error appeared on the stock register to be assignees and holders of 490, and, as assignors of 100 shares of the same, the plaintiff in error brought the present action against them, under the foregoing judicial proceedings, to recover the amount of the calls of 80 per cent. unpaid on the shares, and the declaration, or "complaint," as it is called in New York, sets forth, in substance, the whole matters above

stated, and basis and predicates his sole right of recovery thereon. (Pages 7—14.) The answer of Garth (and the answers of all were to the same effect, and were therefore omitted from the record, page 38), so far as material to the questions now at issue here, may be found on page 16, clause first of the answer, in which he states, in substance, and admits, that the defendants were "gold brokers and bankers carrying on business in the city of New York at the time hereinafter mentioned, and that it was a part of the business of the said firm to buy stocks of corporations for the customers of the firm; that in the month of May, 1866, the said firm caused to be purchased for the account of one of its customers four hundred and ninety shares of the capital stock of the said National Express and Transportation Company, being the same mentioned in the complaint, at the board of brokers in the city of Baltimore, in the regular course of business." Now here is, of course, a plain, clear, and substantial admission that they became dealers in and purchasers of the said stock, qualified, however, that they purchased the stock for a customer in the regular course of their business as stock brokers. And then the answer proceeds to state that the defendants did transfer, or cause or authorize to be transferred, into the name of the firm the stock so purchased for the said customer, and by whom, and not by the said firm, the stock was owned, and that if any such transfer was in fact made it was made fraudulently and without authority, and is void against this defendant. And the answer concludes on the subject by stating, upon information and belief, "that by the authority or direction of said customer for whom the said shares were purchased as aforesaid, the said 490 shares of stock were sold at the said board of brokers in Baltimore on the 10th day of August, 1866"; and that "if the said shares were not transferred on the books of the company into the name of the purchaser it was because its transfer books had at the time been closed, and such transfer was not possible. This defendant denies that either he or his firm were ever the owners of said shares, or that the same were ever registered in its name

upon the books of the said company with his authority or the authority or permission of his firm." All of which might, of course, be true; and yet as it is acknowledged that his firm authorized the purchase of the stock, that it was accordingly purchased by virtue of such authority, and it is not averred or pretended that the company or its creditors had any notice or knowledge of the purpose for which the purchase was made, or who was intended to be the real owner, and responsible for the unpaid stock obligations, the whole proceeding, as thus detailed, was, as to the company, merely *res inter alios acta*, and by it was in no manner affected, and much less the trustees and creditors of the company, who were purchasers for value without notice of the alleged purpose for which the stock was purchased, or the alleged real owner thereof, but who found the name of the firm upon the stock-books as holders of the shares which they acknowledged to have purchased, and of which one hundred shares had been transferred upon the books to their name, and who only heard for the first time of said alleged equities between the actual purchasers and their alleged customer twenty-five years after the stock had been so transferred upon the books, and after the company was in insolvency and judicial liquidation. And if the action had been at common law instead of under the mixed and mongrel procedure of the modern mode of legal confusion in vogue in New York, and first introduced by that State, a demurrer to the plea set up by the answer would of course have been sustained. For it acknowledged authority for the purchase of the stock, and the fact of purchase and the fact of the transfer upon the books in the name of the firm, and the transfer in its name of a part of the stock, and the whole defence was founded upon the basis of the common law and its customs among brokers, in utter apparent ignorance and in absolute disregard of the Code of Virginia, entered into and incorporated with every purchase and transfer of the unpaid shares of the stock of this company. But as that easy, exact, and lucid mode of presenting legal questions for judicial determination was not admissible under

the New York code of procedure, and which would have presented for direct decision whether the common-law custom of brokers on the stock exchange as to the purchase and transfer of unpaid stock, or the statutes and jurisprudence of Virginia, were to prevail in this case, brought under the authority of Virginia judicial proceedings, and based upon the statutes and jurisprudence of Virginia, by a trustee purchaser for valuable consideration without notice of any alleged equities, first set up a quarter of a century after the vested rights of the beneficiary creditors accrued, the only resource was to go *pell-mell* before the court and jury as to the law and the facts of the case. And, as will be seen upon the trial thus had, it turned out that the charge in the ~~action~~ of fraud in the transfer of the stock upon the books in the firm-name of the defendants was eliminated from the case, as there was not a particle of proof upon the subject. The charge, indeed, was without specification as to whom the alleged fraud was imputed, or in what it consisted, and was too vague and indefinite even to have raised an issue for controversy, since fraud must be clearly alleged and distinctly proved. But had it been made with all necessary precision and certainty against even the officers or agents of the company, it would not, *per se*, have made void the transfer, but only voidable at best, and the transfer would have remained valid alike as to the defendants and the company and its creditors until duly cancelled and set aside, which could have been effectually done only by prompt proceedings in equity for the purpose, and none were attempted. *Upton* v. *Triblecock*, 91 U. S. 50, 51; *Upton* v. *Englehart*, 3 Dillon's C. C. R. 553–6, where the whole subject is well considered; *in re, Overend, Gurney & Co.*, L. R. 3 Eq. 376; *Oakes* v. *Turquand*, L. R. 2 H. L. (Eng. & Irish Appeals) 325, 344; *Upton* v. *Triblecock*, 91 U. S. 50, 51; *Upton* v. *Englehart*, 3 Dill. 496, 503–6; *Lee Bendyr* v. *Harding*, 87 E. C. L. 551; *Daniel* v. *Off. Marg. R. B. Bank*, 1 H. & N. 681; *The Deposit, &c. Co.* v. *Aysand*, 88 E. C. L. 761; *Henderson* v. *Royal Bank*, 90 E. C. L. 356; *Bulch. Pl. &c. Co.* v. *L. R.*, 2 Ex. 384; Ashley's Case, L. R. 4 H. L. 64,

73, 77, 78, *et seq.*; S. C. 3 Ch. App. 604; *Stainback* v. *Fernley*, 9 Sim. 557; *Ross Estates Investment Co.*, L. R. 3 Ch. 682; *Reese Silver Mining Co.* v. *The Liquidators, &c.*, Eng. & Irish App. 64; *The Directors, &c., of Central Venezuela* v. *Kirk*, 2 L. R. Eng. & Irish App. 99; *The New Brunswick Co.* v. *Conybear*, 9 H. L. Cas. 711, 724; Kerr on Fraud and Mistake (Bump's Ed.), 329, 330; Cook on Stock and Stockholders, § 356; Morawetz on Corp., §§ 830, 840.

But the answer admitted that the firm caused the purchase of the 490 shares of stock, and thus admitted that they were actual dealers in the stock of the company, qualifying the admission, however, by the allegation that the purchase was made in the course of their business as brokers for one of their customers, a qualification wholly immaterial, if true, and made known to the company at the time, of which there is no pretence. For there was no provision in the statutes of Virginia governing the transfer of unpaid stock and the registry of the transfer upon the corporate books, authorizing or permitting the fiduciary character of the ownership to appear, whether as trustees, agents, brokers, executors, or administrators (except that as to executors and administrators succeeding to the title by devolution upon the death of the owner), or making or permitting any distinction between the equitable and the legal title, so far as the corporate books were concerned, but on the contrary the statute expressly excluded all such distinction by providing that "the person in whose name shares of stock stand upon the books of the company shall be deemed the owner thereof, as it regards the company." The case, therefore, was the direct opposite of the class to which *Burgess* v. *Seligman*, 107 U. S. 20, belongs (but to which it is likened by opposite counsel), in which the statute of Missouri provided that no person holding stock in certain trust capacities enumerated, or as collateral security, should be held personally liable on account of the stock, and parol evidence was allowed to show that Seligman was within the exemption of the statute. And hence the present case is clearly within the general

rule that, in the absence of such statutory provisions, a person who deals in the purchase of corporate stock and causes his name to be placed upon the corporate books as the owner of the stock, or *allows his name to remain on the stock-books* after *the fact comes to his knowledge that it has been placed there* (whether with or without his authority), *and thus permits himself to be held out to the world as the owner of the shares*, is conclusively estopped and bound as a stockholder, as regards the company and its creditors and the other shareholders, and especially when, as here, the statutes subject to which he was dealing in the stock expressly declared that while transfers shall be valid as between transferrors and transferrees, and the equities between them be respected, yet that he in whose name the shares stand on the books shall be deemed the owner thereof as to the company, and all equities as to the ownership, of whatever kind, are absolutely ignored. (Lowells on the Transfer of Stock, chapter IV, sections 82, 83, *et seq.*, and references in *notes.*)

So that, giving to the answer of the defendants the fullest advantage as a defence, it constituted no defence to the action; for, admitting, as the answer does, the purchase in May, 1866, and the holding of the shares of stock in question for and on account of a customer, and paying for and carrying it for him, and alleging that the names of the defendants were placed upon the corporate books of registry without their knowledge and without their authority, yet it affirmatively shows complete knowledge on their part of the fact that the transfer of the shares had been made to themselves, and that the shares stood upon the books in their firm-name, and does not allege that they did anything as to the company, or its creditors, or the other shareholders whose names appeared upon the books, by way of objection to that public registry of their names as holders and owners of the stock, but on the contrary alleges, by way of defence, and the only additional defence, that by authority of their alleged customer the shares were sold on the 10th day of August, 1866, and that "if the said shares were not transferred on the books of the said compauy into the name of the

purchaser, it was because its transfer-books had at the time been closed and such transfer was not possible." (Page 16 of Record.) Thus showing the exercise of the power and incidents of complete ownership and dominion of disposition by making sale of the shares in their own firm-name, as they stood upon the corporate books (and it could have been made in no other name), and naively accounting for the failure of transfer upon the books from their name to the purchaser only by the alleged fact that the transfer books were closed at the time of the sale in August, 1866, three months after the purchase and holding of the shares, and their appearance upon the books in the name of the defendants, and without objection or demurrer, by the defendants, so far as the company, or its creditors, or other stockholders were concerned.

It was in this state of the pleadings that the case went before the court and jury under the New York code of procedure. The declaration, or complaint, which was, in substance, the same as used in all of the hundreds of cases in this multifarious litigation, and uniformly approved by the courts, stated a perfect cause of action against the defendants. The answer, so far from showing a defence, admitted and stated facts which, f true, showed the plaintiff plainly entitled to judgment in his favor, by the statutes, jurisprudence, and judicial proceedings of Virginia, under which he alone claimed, and by authority of which he had brought his action. And now as to the proofs on the trial.

The plaintiff (the partnership of the defendants having been previously shown, pp. 40–46, and the charter and the statutes of Virginia having been introduced and proved, pp. 46–66) produced a certified copy of the judicial proceedings in Virginia (pp. — –110), and then, upon introducing the stock-books of the company, showing upon their face that the defendants were stockholders as to the company, alike as purchasers and assignees of 490 shares and as vendors and assignors of 100 shares, as those books disclosed, might well have rested his case, as *prima facie* proved, upon the legal presumption and inference

of the common law, above stated as the law of this court and of the courts of Virginia, that persons whose names appear as stockholders upon the books of such a company were to be re-regarded as such, subject to rebutting evidence that they were strangers to the company, and had never had any dealings in or with its stock, by subscription or purchase, or otherwise. But nothing of the sort was done, and no reliance was placed upon that well-established rule of evidence, although it was ancillary and indèpendent proof of the connection of the defendants with the company. And no reliance was placed upon it, for the obvious reason that its aid was not needed; for, by the terms and admissions of the answer, the defendants admitted that they were actual dealers in the stock, though for account of another, and were thus admittedly subjected and subjected themselves to all the statuory rights and obligations of purchasers and holders of the shares, and as their names appeared upon the books as such purchasers and holders, they were conclusively bound as such to all of the incident obligations to the company and its creditors and other shareholders whose names appeared upon the books.

For these reasons, and in confirmation of the admissions and averments of the answer, showing that as to the company and its creditors they were actual dealers in its stock, and that they purchased and paid for the shares by their agents, and actually sold and ordered the same to be transferred upon the books, which was partially done, and without any notice to the company, or to any secret equities, the plaintiff in error introduced evidence—first of the books of McKim & Co., the recognized agents of the defendants, and the clerks of the firm and the surviving member of the firm—to prove the purchase in May, 1866, of 365 of the shares by McKim & Co., as the brokers and agents of the defendants, and the sale of the 490 shares on the 10th day of August, 1866, and the books of the company showing the receipts of the certificates of purchase of the 365 shares by the defendants, and the transfers of the whole 490 shares upon the books of the company to the

names of the defendants, and their recognition and acceptance of the whole transactions as between themselves and McKim y the payment of the account of purchases and sales d by McKim & Co. See following ~~notes~~ facts.

—On pp. 112-13, Mr. S. J. Hines, a clerk, testified as follows:
tion 6. Were Harrison, Garth & Co. customers and correspondents n & Co.?
ver 6. Harrison, Garth & Co., in the sense that McKim & Co. ıd sold stocks for them, were customers of McKim & Co.
tion 7. Were any purchases made on their account by McKim & een May 11, 1866, and May 24, 1866, inclusive, of National Express sportation stock, in all 355 shares, as appears in detail in the book?
er. I have no personal recollection outside of the book.
ın extract from the said book of McKim & Co., showing the details ırchase and sales was filed, marked Exhibit S. J. H., No. 1, and ɔund on p. 121 of the record in this case.)
tion 8. Were there any sales made by McKim & Co. of National and Transportation Company's stock for account of Harrison, Co.; if so, how many and when?
er. On August 10, 1866, appears the sale of 490 shares of National and Transportation Company's stock for account of Harrison, Co. in my own handwriting.

"SAM'L J. HINES."

n pages 114, 115, Mr. W. S. Whitely, Jr., another clerk of McKim stified, and showed that the transfer of the stock on the books of & T. Company to Harrison, Garth & Co., were made by him and ɔipted for by him in the name of McKim & Co. on the 13th of July, the details are fully given.
es 123, 124, 125, Mr. Hollins McKim, surviving member of McKim stified and corroborated the statements of the clerks of the firm, as

ɔes 123-4:
tion 6, by same. Did your firm have any business transactions with ɔf Harrison, Garth & Co. in the year 1866? If so, what was the those transactions?
ver. Yes. The transactions were in the purchase and sale of the National Express and Transportation Company's stock.

"Question 7, by same. Can you state what number of shares of that stock you bought and sold for the account of Harrison, Garth & Co. during that year, 1866?

"Answer. We purchased 355 shares and sold 490 shares.

"Question 8, by same. Can you state whether or not Harrison, Garth & Co. paid your firm for the stock you purchased for them, and whether or not

† "Answer 7. Yes, sir; by the book before me there appears to have been bought, on May, 11, 1866, for them, 185 shares of the N. E. & T. Co. stock; in all, 355 shares, as appears in detail in the book.

your firm accounted to Harrison, Garth & Co. for the proceeds of the stock sold for them?

Answer. Yes; to both questions.

Question 9, by same: Did you render an account of your purchases and sales of that stock, and did they object in any way to said account?

Answer. We did, and they never made any objection on that account." And on p. 125:

"Question 22, by same: You say that you purchased for Harrison, Garth & Co. 355 shares, and that you sold for them 490 shares. From whom did you receive the other 135 shares for sale?

"Answer: My remembrance is that I received them from either Harrison or Garth. My remembrance is that it was the same person who gave the order to buy."

Then on pp. 126, 127, the plaintiff, from p. 8 of the stock ledger of the N. E. & T. Co., entered as follows:

"Entry from page 8 of the stock ledger read in evidence as follows: On July 12, 1866, transferred to Harrison, Garth & Co., of New York, from McKim & Co., transfer numbers 900, 901, 902, 903, certified number 865 for 50 shares; requisition paid, $750.

"Same date, transferred to the firm of Harrison from William W. Spence, transfer numbers 900, 901, 902, 903; certificate number 568, for fifty shares; requisition paid, $750.

"Same date, transferred to the firm of Harrison, Garth & Company, New York, from Elkees & Bambeger, same transfer number; certificate number 442, for fifty shares; requisition paid, $750.

"Same date, transferred to the firm of Harrison, Garth & Company from Solomon King, same transfer number; certificate 561, for twenty-five shares; requisition paid, $375.

"Same date, transferred to the firm of Harrison, Garth & Company, of New York, from O. W. Hahn, same transfer number; certificate number 348, for ten shares; requisition paid, $150.

"Same date, transferred to the firm of Harrison, Garth & Company from John J. Scott, same transfer number; certificate number 650, for fifty shares; requisition paid, $650.

"Same date, transferred to the firm of Harrison, Garth & Company from William Woodward, same transfer number; certificate number 514; number, fifty shares; requisition paid, $750.

"Same date, transferred to the firm of Harrison, Garth & Company from D. W. Cochran, same transfer number; certificate number 502, for tweaty shares; requisition paid, $750.

"Same date, transferred to the firm of Harrison, Garth & Company from William Fisher, same transfer number; certificate number, 508; number of shares fifty; requisition paid, $750.

"On July 26th, transferred to the firm of Harrison, Garth & Company from R. H. Avothee, transfer number 924, one hundred and thirty-five shares, on which requisition was paid, $2,025."

The Court (interrupting): What is the total number of these shares—how many altogether?

(Counsel for plaintiff: Four hundred and ninety shares.)

"On the 27th of August, transferred from the firm of Harrison, Garth & Company; same year (1866) transferred to Dr. McElwaine, 938, certificate number 901, one hundred shares; requisition paid, $2,000."

Next (p. 128) the plaintiff introduced Mr. Samuel I. Harrison, a member of the defendants, Harrison, Garth & Co., who testified as follows:

"Question. I show you a stock certificate in the name of Harrison, Garth & Co. for 100 shares of the National Express and Transportation Company, numbered 901, dated July 13th, 1866, and ask you if you recognize the signature to the endorsement of that certificate [handing him the paper]?

"Answer. Yes, sir.

"Question. Whose handwriting is the name 'H. N. Bullington'?

"Answer. He was our book-keeper.

"Question. In whose handwriting is the signature 'Harrison, Garth & Co.'?

"Answer. Mr. Garth.

"Question. David J. Garth, the defendant?

"Answer. Yes, sir."

Then, on pages 128, 129 is given the certificate of stock, as follows:

"Capital, $5,000,000. Shares, $100 each.

The National Express and Transportation Company.
Incorporated under the laws of Virginia.

"No. 901.

"This is to certify that Harrison, Garth & Co. are entitled to one hundred (100) shares of the capital stock of the National Express and Transportation Company, on each share of which has been paid $15 in cash, leaving $85 to be paid when called for. Transferable only on the books of the company on surrender of this certificate." [Here follows the corporate seal and signature of the vice-president and treasurer]. And on this certificate was the following endorsement:

[ENDORSED.]

"Know all men by these presents, that we, Harrison, Garth & Co., for value received, *have bargained and sold*, and by these presents do *sell* unto D. McIlvaine, of Baltimore, one hundred shares (100 shares) of the within named company, standing in our name on the books of the said company; and *do hereby constitute and appoint J. V. H. Allen*, of Baltimore, *our true and lawful attorney*, irrevocably for us and in our name and stead, *to transfer and set over all or any part of the within shares*, and for *that purpose to make*

and execute all necessary acts of assignment and transfer, hereby ratifying and confirming all that our said attorney shall lawfully do by virtue hereof.

25c. U. S. Revenue Stamp, Cancelled Aug. 10, 1866, by H., G. & Co.

In witness whereof, we have hereunto set our hand and seal this twenty-seventh day of August, one thousand eight hundred and sixty-six.

"In presence of HARRISON, GARTH & CO."

"H. N. BULLINGTON.

As to those facts established by the record there is and can be no dispute. And they show, beyond question, that the defendants were dealers in the stock; that they bought and sold the shares, as in their own right and as of their own property, and without any intimation to their agents for the purchases and sales as to any equities between themselves and any other person, or that the purchases and sales had been made in any other right or interest than their own. And much less does it appear, and it is even not alleged, that, as to the vendors and assignors of the stock to the defendants or as to the company, there was ever any intimation made by the defendants that they were not purchasers and assignees, for value, in their own right, when the sales and assignments to them were made and executed, and their names were accordingly placed upon the books of the company, in accordance with the law, being, and rules of the company, in order to make the transfer of title complete.

And then the plaintiff rested his case. It was a complete and perfect case upon his proofs, which, like his declaration or complaint, was founded exclusively upon the statutes of Virginia embodied in the charter of the company, the deed of trust of the company, the judicial proceedings and decrees of the Virginia courts adjudicating the validity and construction of the deed and making calls upon all the stock and stockholders of the company, their legal representatives and assigns, and the acts of the defendants in the purchase of (and paying for) 490 shares of the stock, in May, 1866, and the sale of the same by them on the 10th day of August, 1866, as proved by the

books of his agents and their clerks and the surviving member of the firm, and the execution of powers of attorney for their transfer upon the books of the company (of which a sample power appears), the transfer upon those books of all the shares from their vendors to the defendants, and the actual transfer of 100 shares by the defendants upon the books, as late as August 27, 1866: all of which had occurred before the execution by the company of its deed of trust of September 20, 1866, which swept along into the trust the said 490 shares of unpaid stock, as well as all the rest of the 1,000 shares standing upon the books in the names of stockholders and their assignees, and conferred upon the trustees in the deed and its beneficiary creditors a perfect title as purchasers for value, without notice of any equities, and good against the world.

That being the clear case of the plaintiff, the defendants introduced only one witness to upset it—the defendant Garth himself—whose testimony (p. 130 *et seq.*), on the contrary, instead of contravening the proofs of the plaintiff, fully corroborated them in every respect as to the actual purchase of and payment for the stock by the defendants, its actual sale and transfer by them to the purchasers, and execution of powers of attorney for their transfer from them upon the books of the company to the purchasers, but qualified the statement (as in his answer to the complaint above shown) by stating that the purchases were made not for themselves, but for account of a customer, in the usual course of their dealings as brokers in the purchase and sales of stock on the Stock Exchange of New York, in which the certificates were never before, in their millions of transactions, made payable to themselves, and transferred to their names upon the corporate books, but always in blank, so that, as brokers buying or carrying stock for others, they were not responsible for unpaid stock obligations, and that the transaction in this case was in the ordinary course of the business of the firm. And Garth further testified that he did not authorize, nor did any member of his firm, the stock in question to be bought in the name of the firm or transferred to the

firm upon the books of the company, and that as soon as he discovered the fact upon receipt of the certificates (see pages 128, 129)—which must have been about the middle of July, 1866, as they bore date the 12th of that month, and were on that day transferred to the defendants upon the books of the company (page 127)—he immediately returned the certificates to Baltimore with instructions to sell them and have them transferred from the name of the firm, which instructions were executed by McKim & Co., in respect of the whole four hund ed and ninety, as to sales and transfers to purchasers, and in respect of one hundred shares, also on the books of the company, as shown in the plaintiff's proofs. And that was all he did, or that was done by his firm (see pages 130—136 for Mr. Garth's testimony in full), either in repudiation of the purchases or in rescission or cancellation of the transfers of the shares to themselves either by the vendors and transferrors or by the company upon its books. It is not pretended by Garth that he ever informed his agents, McKim & Co., or anybody else, when sending back the certificates for sale and transfer from the name of his firm, that his firm did not purchase the shares in their own right and for themselves, but for account of a customer. Nor does he pretend ever to have had any communication, direct or indirect, with the company upon the subject. On the contrary, he seems to have kept the secret studiously to himself and his firm. The company, therefore, had not the remotest notice of the alleged secret relations between themselves and their customer. Nor had the vendors and the transferrors of the stock to the firm. In this state of facts and condition of things the shares were regularly transferred to the defendants in their firm-name by their vendors and transferrors, who, having a perfect legal right and incumbent duty to see that their assignees were solvent and responsible persons, and that the transfer should be made upon the company's books, had shown their willingness to accept the defendants as such by making the sales and transfers directly to them, and there is nothing to show that they ever would have made a sale

of their shares in blank to anybody or for any purpose if requested so to do. And the company, under the statutes of its organization and being, had no authority or power to allow transfers upon its books in blank, which would have been in direct evasion and violation of the fundamental law of its creation and existence. The transfers, therefore, upon its books of these shares were made in the ordinary, regular, and legal course of its business, and in the exercise of its clear right and duty of ascertaining and accepting the defendants as solvent and responsible assignees, and as such proper persons in whose names the shares should stand upon its books as the legal and equitable owners of as regarded the company. The whole transaction having been made in the ordinary and proper course of its business, and the names of the defendants regularly placed upon its books as the holders and owners of the shares in their own right, those names stood upon the books as those of any other stockholders and owners, either as original subscribers or assignees of original unpaid stock, and were thus held out to all persons dealing with the company, and to all of the other stockholders of the company, as fully bound for the payment, *pro tanto*, of the original capital subscribed as a trust fund for the corporate purposes and the payment of its creditors. Upon the receipt of the certificates of stock in the middle of July, 1866, the defendants became aware of their responsibilities as owners of the stock upon the face of the corporate books, and being not willing to continue bound in accordance therewith, at once took steps, as has been shown, to get rid of the same, and no doubt in taking those steps they were perfectly honest and sincere.

But, unfortunately, as shown by Mr. Garth's own testimony, the defendants had dealt with these unpaid shares in accordance with their usual course of business as brokers, as shares payable and transferable in blank, according to the common law and its customs as understood and followed by brokers on the stock exchanges; and the alleged agreement between the defendants and their customer for the purchase and carrying

of this stock on his account and not their own was perfectly regular and proper according to the common law and the said customs and ordinary course of business thereunder, but, as above shown, that mode of dealing in the unpaid stock of a Virginia corporation was an utter and absolute legal impossibility; and the alleged agreement or contract between the defendants and their customer in this case was excluded as a possibility by the constitution and organization of this company, so far as the company and its creditors were concerned, unless and without the transfers of the shares to the defendants should appear upon the books of the company and their names be there held out as the owners of the shares. And still more unfortunately for the defendants, when they discovered in the middle of July, 1866, that the shares had been transferred upon the books of the company into their names, they took no steps whatever for rescission or cancellation of the whole transaction as between their vendors and transferrors and themselves, or as between themselves and the company and its creditors, but, on the contrary, took the very steps, if any were necessary, to establish and confirm their liabilities as stockholders by assuming that the stock was their own, and by acting as if the stock was their own, and authorizing and directing sales of the stock which thus stood in their names upon the books of the company, and transfers from their names to the purchasers, *inter sese*, and upon the books of the company, and executing powers of attorney for the accomplishment of those purposes. It is needless to say that the steps thus taken for the removal of the stock from their names alike as to their transferrors and assignors and as to the company, were the very best possible means which they could have taken, as to those parties, not only in respect of the ratification of all that had been done by their agents in the purchase and transfer of the stock to their names, but in order irrevocably to bind themselves as the lawful holders and owners of the stock as to the company upon the face of the books of the company. Of course it was an "impru-

dence" (as it was called in the opinion of the Court of Appeals of New York), and a very great one, based, as it obviously was, on an entire ignorance or disregard of the statutory organization of this company and of the only permissible dealings in its stock; but, in legal astronomy, the first light appeared in that opinion that ignorance of the law and imprudence in acting upon a mistaken conception of the law operate to exempt the party from the established legal consequences of his act. In *Upton* v. *Triblecock*, 91 U. S. pp. 50–51, this court said:

"The law is presumed to be equally within the knowledge of all parties.

"That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it would be a disastrous doctrine.

"That a defendant, who could not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed. *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380.

"The rule that a mistake of law does not avail, prevails in equity as well as at common law. *Bank of U. S.* v. *Daniel*, 12 Pet. 32; *Hunt* v. *Rousman*, 1 id. 1; 8 Wheat. 174; *Mellech* v. *Robertson*, 25 Vt. 603; *Leant* v. *Palmer*, 3 Comst. 19.

"'If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged, and the court would, for the purpose of determining on this point, be often compelled to enter upon questions of fact insoluble and interminable.' Austin's Jour., vol. ii, p. 172; Kerr, 397."

And that is the whole case of the defendants in error. It cannot be necessary to examine and criticise in detail the opinion of the learned Court of Appeals of New York, or to show further its error in rejecting the Virginia statutes and Virginia judicial proceedings by avoiding their plain effect and application, and in protecting the defendants in error from the plain

legal consequences thereunder of their own acknowledged acts in dealing in the stock of this company. *Hawkins* v. *Glenn*, 131 U. S. 335, fully applies, in which Hawkins was held liable under circumstances much stronger in his favor, as he made known to the clerks and the directors of the company that he had taken only 50 shares for himself, and the other 200 shares for his friends.

The defendants in error dealt with this stock upon the basis and usage of the common law and its customs on the stock exchanges. The Court of Appeals of New York recognized and acknowledged that mode of dealing as the law of this case, and so decided accordingly: It acknowledged and recognized the secret and concealed intention of Mr. Garth in the dealings of his firm as to this stock, as the law of the case, in respect of the company and its creditors, as that law was recognized by the rules and usages of the common law stock exchanges. It altogether overlooked, disregarded, and rejected the rights of the plaintiff as based exclusively upon the statutory law and the jurisprudence of Virginia, the judicial proceedings in Virginia conclusively binding upon the stockholders of the company, in respect of the decrees of call, and all else, and the constitutional and legal effect of that law and of those judicial proceedings, and thus ignored and deprived the plaintiff in error of his Federal rights plainly shown upon the whole record, and in the opinion and judgment of the court by which they were ignored, disregarded, rejected, and set aside.

The foregoing statement of the plaintiff's case has necessarily compelled and implied its argument. The statement was, in fact, its only needed argument. That the certified opinions of the New York Court of Appeals (pp. 167–171, 172–177) are parts of the record in such cases is well settled. (*Phila. Fire Assn.* v. *New York*, 119 U. S. 110; *Wood Co.* v. *Skinner*, 138 U. S. 295–296.)

If it be necessary to formulate the grounds of our contention, it may be done as follows:

POINTS.

1. That the whole case depended upon Virginia law and judicial proceedings, and the facts as shown.

2. That the court below decided the case without respect thereto, and based its decision upon the common law and its usages and customs, and the private intention of the defendants in error, instead of upon their actual dealings with this stock, subject to the Virginia Code.

3. That the decision necessarily involved, by legal intendment and implication, a denial of the Federal rights involved.

4. And that there was no separate and independent ground broad enough to support the judgment, except by excluding the Federal rights involved in the very nature of the proceedings and proofs, and in the decision of the court below adversely to the rights claimed.

5. That a judgment of reversal should be rendered, upon the merits, in accordance with the leading case of *Murdock* v. *Memphis*, 20 Wall. 556; and that this court should now render a judgment such as the New York court ought to have done. And after having paid the judgment the defendants in error will have a clear remedy not only against whoever wrongfully caused the stock to be transferred to their names upon books of the company (if anybody did), but against their assignees of the stock for indemnity. (*Kellock* v. *Enthoren*, L. R. 9 Q. B. 241.)

JOHN HOWARD,

Of counsel for plaintiff in error.

RICHMOND, VA., December 17, 1892.

47 U. S. 360

Office Supreme Court U. S.
FILED.
DEC 22 1892
JAMES H. McKENNEY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 1160.

JOHN GLENN, as Trustee of and for the benefit of the creditors of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY,

Plaintiff in Error,

against

DAVID J. GARTH, ROBERT A. LANCASTER and SAMUEL J. HARRISON,

Defendants in Error.

DEFENDANTS' REPLY TO THE BRIEF IN OPPOSITION TO THE MOTIONS.

Reply to the so-called separate Brief of Burton N. Harrison, Esq., which is the only Brief served upon us by Counsel for the Plaintiff in Error in compliance with the instructions of the Court on November 28, 1892.

WILLIAM C. CLOPTON,
ROBERT L. HARRISON,
JOHN R. ABNEY,
Of Counsel for Defendants in Error.

C. G. Burgoyne, cor. Walker and Centre Streets, N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN GLENN, as Trustee of and for the benefit of the creditors of the National Express and Transportation Company,
Plaintiff in Error,

vs.

DAVID J. GARTH, ROBERT A. LANCASTER and SAMUEL J. HARRISON,
Defendants in Error.

Reply for the Defendants in Error.

Defendants' Reply to the Brief in Opposition to the Motion.

It is almost impossible to exercise any degree of patience in replying to the numerous misstatements of fact and misapplications of law set out in the brief for the plaintiff in error in opposition to the motions to dismiss or affirm. Counsel for the plaintiff assumes to think that when a motion to affirm is coupled with a motion to dismiss the case is necessarily brought up for argument before this Court on its merits, and in that erroneous assumption he unwittingly attempts to estab-

lish for this Court a rule whereby all causes in which such motions are made can thus be taken out of their regular order on the calendar and made preferred causes. There is no authority for such a pretense. It would seem to be not only disrespectful to the intelligence of this Court, but it is a bold attempt to take advantage of the defendants, and have this case submitted on its merits on the plaintiff's brief alone without giving the defendants an opportunity to reply adequately to the whole case. We have heretofore confined ourselves strictly to the merits of the motions, and shall not now be led off to an argument of the case beyond a denial of some of the extraordinary statements made by counsel in his brief, and made without foundation in fact or law. We have no authority for going beyond this. The last forty pages of Mr. Harrison's brief, beginning with Point IV., are an exact reprint, with a few interlineations to make the context applicable here, of his printed brief heretofore submitted to the Court of Appeals. As to the misstatements of fact and misapplication of the law contained in these pages the opinions of the General Term of the Supreme Court, and of the Court of Appeals, of New York, contain specific and conclusive answers (Record, pp. 158–162, 167-171, 172–177).

Part I.

The verdict in this case was a verdict of the Court and not a verdict of the jury, says the Court of Appeals (Record, 176). The trial Justice, in disposing of the case, stated from the bench that he could not do justice to the case at *nisi prius*, and, in order not to prejudice the plaintiff, would order a *pro forma* verdict for the amount he claimed, and send him, with suspension

of judgment, to the General Term, where the exceptions could be heard on the printed case. The Justice instructed, at the time, the plaintiff to prepare and print the case, which he did, and cited the defendants' counsel to appear before the General Term, where he would make a motion to overrule the exceptions. Every word of the case was prepared and printed by the plaintiff, and the defendants' counsel permitted him to add in the case documents and Virginia Statutes and decisions which were never offered in evidence by his counsel at the trial. So every word of the evidence taken at trial is now before this Court in the printed record. If there is anything material left out, and to which mere reference is made in the case, it was purposely done with the object of claiming before the appellate Courts that the case was not complete, and that there was other evidence not before the Courts which moved the jury's mind in coming to its verdict. This claim was actually made afterwards before the Court of Appeals, which exhibited manifest signs of disgust when the plaintiff's attorney was compelled to admit in answer to a question of the Chief Judge that he prepared and printed the case and brought it on for argument in the name of the defendants, with their counsel's consent, before the General Term. The jury had no more apprehension of the case than the Man in the Moon, excepting the testimony of Mr. Garth, and the jury, after the trial, stated openly that they would have rendered a verdict for the defendants, if the Court had permitted the case to go to them (see Record, p. 176). It is not true that this action was commenced October 28, 1886, and there is no evidence to show the fact. This interpolation was made in the case after it had been submitted to the defendants' attorneys for amendments, and returned with their amendments to the plaintiff's attorney. The interpolation was made for the purpose of claiming, on appeal, that the corporation was a "going concern"

after September 20, 1866, the date of its assignment, and thereby attempt to obviate the twenty-year rule of limit under Hawkins vs. Glenn, and the Virginia decisions there cited. This action was commenced on December 9 and 11, 1886 (Record, p. 6).

It is not true in fact or law that the injunction obtained in the Supreme Court of New York by one Alexander J. Meyer, an alleged stockholder, in October, 1866, arrested the operation of the Statute of Limitations, or enjoined the assignees from bringing suits against the stockholders for their unpaid subscriptions. On the contrary, Meyer's action, as the bill clearly shows, was brought in the *interest* and for the *benefit* of the creditors, and not for their *injury*, or to prevent any action it might be advisable to take against the stockholders. The object of this individual suit was to have the corporate assets preserved for the payment of the company's just debts. It enjoined no suits whatever against the stockholders on their unpaid subscriptions. It is not true that this injunction was dissolved on April 2, 1886, nor at any other time. This old injunction is still in force in the Supreme Court of New York, so far as it can affect this plaintiff assignee, who succeeded the assignees, Kelly, Hoge and O'Donnell. The action as to the plaintiff, Meyer, and certain directors, who were defendants, was removed to the Federal Court, but as to Meyer and the assignee, Kelly, on whom, as assignee, service of the summons was obtained only, was never removed from the State Court, and could not be removed, because Meyer, the plaintiff, and Kelly, the assignee defendant, were residents of the same State, New York. This injunction, therefore, is still in force in the State Court, and if it inhibited Kelly then from bringing this suit it inhibits his successor, this plaintiff, now from doing so, and he has no business to be here in contempt of that injunction. The defendants in error never heard of Meyer or his suit, or the pretended injunction, until the trial of this

action, nearly a quarter of a century after the injunction was issued. The alleged dissolution of this phantom injunction on April 2, 1886, was a mere sham, and made for the unique purpose of imposing on the courts an excuse for the plaintiff's unreasonable laches, and of avoiding the Statute of Limitations. The record shows conclusively that the injunction, so far as it affects this plaintiff assignee, has never been dissolved (Record, pp. 142, 149). This injunction, so far as it was *partially* dissolved on April 2, 1886, in the Federal Court as to certain parties, was vacated for the mere asking and without any opposition whatever, and could have been vacated at any time in the past twenty years on mere motion by the assignees, or any party in interest. If, then, that injunction order in the State Court ever at any time stood in the way of the plaintiff bringing the action in this case, it still stands in his way, and he is *particeps criminis*, and the case one of *volenti non fit injuria*. The conclusion which follows from the burden of the plaintiff's whole argument is, that he is suing these defendants on a statutory penalty, and no Court will enforce the statutory penalties of a foreign or sister State.

Again, why was the defendant Lancaster not sued in Richmond, Virginia, where he resides? Why wait to catch him in New York, and not sue him in the domicile of the corporation? Mr. Lewis Ginter (Record, p. 6), the defendant and wealthy cigarette manufacturer, was sued in Richmond, Virginia, where he resides, and he defeated the action there.

It is not true that each of the separate answers of the defendants admit that "in the month of May, 1866, the said firm (Harrison, Garth & Co.) *caused to be purchased* for the account of one of its customers" said shares. This was another interpolation made in the case after it left the defendants' hands with the amendments of their attorneys returned with the case. The original and verified answers each read: "In the month of May,

1866, *there was purchased* for the account of one of its (Harrison, Garth & Co.'s) customers," etc. And this is in perfect accord with what follows in each answer.

It is not true that the stock was purchased in the name of the defendants' firm; nor is it true that the defendants held the stock for a single moment with the intention of accepting it after they received it in the latter part of July, 1866. The stock was repudiated and returned immediately (see Mr. Garth's testimony in full, Record, pp. 129–136). Ficklin was engaged some two or three months in picking up the stock in Baltimore and Virginia, and finally succeeded by the end of July, 1866, in securing at his prices 490 out of the 500 shares, which he caused to be transferred to the defendants in different lots by his brokers, and, thereafter, shipped through McKim & Co. to New York. If the stock remained unsold for a few days after it was returned, it was possibly because of Ficklin's absence from Baltimore, or else because there was no ready market for the stock, which was all finally sold on August 10, 1866, at a loss; which loss Ficklin paid in part, the whole of which he had promised to pay Mr. Garth prior to his (Ficklin's) death. These questions have all been passed upon twice by the Court of Appeals, and once by the General Term. It is not true that *any agent* of the defendants purchased the stock, or had anything to do with it in their behalf. It is not true that they sold or repudiated the stock by reason of *any panic*. The defendants were a rich firm, and, if they paid all or any assessments on the stock, as pretended, before it was transferred to them, why should they allow it to be sold on August 10, 1866, at such sacrifice, when the corporation was not even in contemplation of bankruptcy, with more than $4,000,000 of its capital stock uncalled in the hands of its shareholders? Again, if this company then at that time was in such financial straits, which culminated in its assign-

ment on September 20, 1866, why, as is pretended, should any one continue to give it credit *blindly* upon the faith of stock being placed in the names of these defendants? As Mr. Garth testified, the defendants were not speculators, but bankers and gold brokers, and it was against the rule of the house to speculate in stocks, or permit the stocks of customers to be transferred to the firm name. There is, again, no evidence about any adhesive or revenue stamp in this case. How could the revenue stamp be canceled in New York on August 10, when the stock was sold that day in Baltimore in the regular course of business? There is not a word of evidence to show that Mr. Garth, who endorsed the powers in blank, put his firm's initials upon those stamps. He was on the stand, and why did not the plaintiff show this pretended fact? How could Mr. Garth, when he returned the certificates, know that the stock was going to be sold on August 10th, beforehand, so as to put that date on the stamps in New York? The pretension is absurd! McKim or Ficklin, who was a notorious speculator, doubtless put those stamps on the stock the day they sold and delivered it, and also the defendant's initials, because the stock stood in their name. The intent of the statute only was to have the initials or letters put on the stamps, when once used by some one with authority, simply to cancel the stamps. There is not a single phase of this case which has not heretofore been argued before the Courts of New York to their complete satisfaction. The plaintiff's brief reads more like an harangue to the jury than a respectful legal argument addressed to the highest Court of the United States.

Again, it is not true that the trial Justice uttered, or thought of, any such words, as are put into his mouth by opposing counsel in his brief. There was no dispute whatever as to the evidence, and the only question which grew out of the trial was a question of law.

It is not necessary that a printed case should contain a *certificate* where a ruling on a question of law is presented for review in the Court of Appeals (N. Y. Code of Civ. Pro., Sec. 993; 130 N. Y., 143; 118 N. Y., 170). Upon the facts, the jury in this case would have been obliged to find for the defendants.

Again, the opposing counsel impeaches the testimony of his own witness, McKim, who testified that the books of the company were closed when he sold the stock. They were doubtless closed for some time before and sometime after the stock was sold. It is well known that the company was then engaged in removing its office, books, &c., from Baltimore to Richmond, Virginia. Again, the plaintiff swore in his complaint that nothing had been paid on account of the stock, whereas, under the compromise decree of July, 1883, the former holders of the stock in Baltimore settled with him to the full extent of what he was entitled to under that decree. Mr. Garth was informed of this fact at the trial, and the plaintiff's witness, Carey, was compelled to admit it. The plaintiff himself never appears at the trial of one of these causes. He dare not take the stand to be cross-questioned as to what he has done, and is doing, with all the money he has collected in these suits, or what creditors there are who have not been paid in full. It is a well-known fact that all the preferred creditors have been long since paid in full, and it has been impossible for the unfortunate stockholders to learn what creditors have not been paid. Besides this case there are *seventy-seven* other suits brought and pending in New York for several million dollars, all filed after the twenty-year limit had expired, and we have recently proven in the trial of a number of these causes that the attorneys conducting these suits get, under an agreement with this so-called "trustee for the benefit of creditors," *sixty per centum* of what they collect in all the actions brought here and

elsewhere. It is not too much to say that this case resolves itself into a scramble for contingent lawyers' fees. As one of our prominent Judges has just recently said, "These contingent fees are fast destroying the tone of the profession, and driving honest suitors from the field of litigation—making of the profession a profession of beggars, except in the cases of a few favored by inheritance and fortunate circumstances." The courts are also being vexed and overrun by these contingent cases, to the exclusion and delay of the rights of honest litigants clamoring to be heard.

Again, much more might be said, as the Court of Appeals says in its opinion, as a commentary upon the plaintiff's brief, but the motions to dismiss or affirm are made upon law questions, and we have nothing here to do with the merits of this case as considered and determined by the appellate courts of New York. We trust, therefore, that this Court will not consider the long and misleading argument which is the burden of the plaintiff's brief in opposition to the motions. Our position has been clearly and concisely stated in the brief filed by us for the motions, and the points there argued have not been successfully answered by the plaintiff in error.

Part II.

We did not, and do not, contend that the writ was not properly directed. On the contrary, it is always properly directed when addressed to a lower court, which is the *custodian* of the judgments and decrees of the appellate court. This is simply, as the present Chief-Justice has said, for convenience, and in no wise prohibited by the statute. But what we do insist on is that the writ was not prop-

erly allowed. It is not a question of convenience to the profession, as the opposing counsel argues, but what the statute says. If Judges, sitting at Chambers in lower courts, are to be permitted to allow writs of error from *this Court* to review the judgments of the highest State Courts, then it is certain that the privilege will soon grow into an abuse and imposition upon the Supreme Court of the United States. Again, no matter how the Justice who allowed the writ describes himself, that description does not and cannot supply the statutory authority. Again, it is little short of nonsense to contend that a lower Court, because it is simply the custodian of the decrees of the appellate court, is, therefore, *the Court passing the decree* in the sense intended by the statute. The signing of an order to enter the judgment of a Superior Court on its remittitur in the Clerk's Office of the Court below, is simply a ministerial duty and judicial formality, with which the Judge below can exercise no discretion whatever. Under the statute, the wisdom of which is apparent, we contend that Chief Judge EARL, of the Court of Appeals, "the Court passing the decree," was the *only* State Justice who could properly allow the writ, and he was easily accessible to the attorney who obtained the writ. We insist that the writ was not only improperly allowed, but that with it there was an abuse of judicial power which ought not to be permitted. We know of no precedent to be found in any case, originating either in New York or elsewhere, for the assumption of such authority. The writ, therefore, should be unconditionally dismissed.

Part III.

The opposing counsel admits in his brief that the stipulation by which he is bound was actually given because of the exaction of the New York statute. He must then cut a sorry figure before this Court in his argument which follows this fatal admission. Of course, it was the exaction of the statute which he now practically asks this Court to override and declare unconstitutional; and, with the same stroke of the pen, he asks this Court to give effect to the constitutionality of a statute of a sister State, which he insists here destroys the unwritten and *inalienable* rights of the citizen. Does the statute he complains of strike at any organic law? Does it controvene any constitutional right? Does it destroy any remedy? Surely not. The statute is founded in public policy, and to prevent flooding the appellate court with cases in which new trials have been granted. The Court has often warned attorneys against the hazard of appeals in such cases. The statute does not, and was not designed to, destroy the rights or curtail the rights of the litigant. It does not, and did not, affect the remedy, nor in any wise restrict the remedy, which was open to this plaintiff, namely, to go back and take a new trial of his case, and then proceed in the way prescribed by State procedure to the Court of Appeals, and thence, if he had a case, to the Supreme Court of the United States. The Wisconsin statute which came up for consideration in the case of Insurance Co. vs. Morse, 20 Wall., 450, requiring upon certain conditions an agreement in writing not to remove a suit from the State to the Federal Court in a proper case, was a State act in contravention of Federal law, which, indeed, destroyed not only the Federal rights of citizens of sister States, but also the legal remedies open to them as litigants in the Federal

courts. All such statutes necessarily contravene and are repugnant to the laws and Constitution of the United States. If the opposing counsel is correct in his contention, then the judgment he has procured against his client in the Court of Appeals amounts to nothing, which the Court would not have passed except for the statute, and hence his appeal was not taken in good faith, and was merely an experiment with the Court. But as long as the decision of the Court was fatal to his appeal, and its decision, as he pretends, really amounts to nothing, since it actually sustained the ruling of the General Term in granting a new trial, where does his argument land him? Why, it simply lands him before this Court with a writ of error in a case in which nothing legal has been done except the granting of a new trial by the Court below. Therefore, nothing stands between this Court and the order of the lower Court granting a new trial. This result, which naturally flows from his inconsistent argument and position, is necessarily thus fatal to the writ; for, as shown in our brief for the motion, this Court will not entertain a writ of error in a case in which a new trial has been granted. All the cases, therefore, cited in counsel's brief, and following in the wake of such enactments as the Wisconsin statute, bear no analogy whatever to the case at bar, while the two statutes are totally unlike in intent and effect—the one destroying altogether rights and remedies, while the other does not affect them—the one declaring the total destruction of the right and remedy, while the other simply warns the right and remedy to be pursued which is open to the litigant.

If there ever was a case where Justice and the Fates have combined to destroy a plaintiff litigant, it is here in this case—in this plaintiff's unrighteous attempt to hold these innocent defendants responsible on the stock in question. Aaron Burr's ethics of the practice of law have here also found illustration of his definition of

law, namely: "Whatever is boldly asserted and plausibly maintained."

We have not attempted to argue the case on its merits. We do not understand that such a thing would be permitted on a motion to dismiss or affirm. All we have attempted to do, outside of mere denial, is to indicate the legal reasons in this and our former brief for the motions why the writ should be dismissed, and, so far as this Court has the power, the litigation in this stale case forever ended.

With these suggestions we submit the motions on the law and decisions indicated in our former brief.

Dated New York, December 21, 1892.

Respectfully submitted,

WILLIAM C. CLOPTON,
ROBERT L. HARRISON,
JOHN R. ABNEY,
Of Counsel for Defendants in Error.

Reply to the so-called separate Brief of Burton N. Harrison, Esq., which is the only Brief served upon us by counsel for the Plaintiff in Error in compliance with the instructions of the Court on November 28, 1892.

Transcripts
of
Records

1892

828 831

Supreme Court U. States
147 U. S.
248 - ~~249~~
360

Defendant's
Exhibit No. 2
No 4244.
Osborne & Co. vs. M. P. Ry. Co. } p. 127

FILED
FEB 8 - 1889
A. B. Selby
Clerk

Missouri Pacific Railway Company

2272

N

MO. PAC. RY.

SOUTHERN WIRE CO.

2273

D. M. OSBORNE & CO.

120'

35'

135'

TRACK LAID March 20th 1887 ORD No 13887

GRATIOT ST.

23RD ST

22ND ST

21ST ST

WIRE WORKS.

WIRE WORKS

SCALE 50' = 1"

The Mo. Pac. Ry. Co.
St. Louis
Jan.
30
1889
Mo.
Office Chief Engineer

MAP SHOWING LOCATION
OF
SWITCH TO
THE SOUTHERN WIRE CO'S WORKS
21ST & GRATIOT ST.
ST. LOUIS

SC 50'=1" JAN. '89.

Plaintiff's Exhibit "B".

No. 424.
Osborne & Co
vs.
M. P. Ry Co. } p. 126

Sidewalk 8'0" wide

Gratiot 40'w Street

130'

Sidewalk 8'0" wide

D. M. Osborne & Co 4 Story Brick

2 Story Br

2 Story Br

1 Story Frame Shed

22nd Street. 60'w.

TRACK

TRACK

TRACK

MAIN

S MAIN

N MAIN

Atlantic Street.

23rd Street 60'w.

Scale of Feet

Filed
Feb 8. 1889
A P Selby
Clerk

No 1197.
Shoemaker et al
v.
Rock Creek Park
Commissioners
} R. 357

United States upon petition of Rock Creek Park commission
vs
Glenn W. Cooper, Trustee, et al
} In General Term
No 1 Original
(No 366 District Ct Doc)

Plat referred to in deposition of
B. D. Carpenter and made part of
respondents Shoemakers sixth bill
of exceptions

FILED
OCT 6 1892
J. R. Young clerk

3

N 73 W 37.8 rds
Part Tract No 37
Beginning of "Addition to Fellowship."
N. 85 W 48.3 rds
Rock Creek Park
Military Road
S 8 E 44 rds
Beginning of Good Luck, 1792
N.E. by E. 140 rds — 1st line of "Good Luck"
No. 40.
No. 41
S 16 E 44 rds
S 16 W 44 rds
Rock Creek Park
Pearce Shoemaker to Cornelia O. Truesdell No Tract "Fellowship"
S 24 W 166 rds
Pearce Shoemaker's part of the "Addition to Fellowship"
"Addition to Fellowship" Granted to John Powell May 16th 1734.
Tract No 39
N 33 E 173 rds
Addition
Dividing Branch
Good Fellowship (part of)
Smith's part of Addition to Fellowship
39 Rock Creek
"Mill Seat" Granted March 18th James White 1772
Pearce Shoemakers part of "Mill Seat."
S 10 E 140 rds
N 10 W 80 rds
S 10 E 88 rds to Head of Rock Creek
Fellowship to Mill Seat
West 64 rds
N 67½ W 52 rds
N 10 E 80 rds
N 31 E 80 rds
Part of "Mill Seat."
James White Sr to Peter Casenave
Deed June 26th 1795 Recorded June 27th 1795
Liber B. Fol 332
N 85 E 44 rds
S 10 E 40 rds
N 50 E 132 rds
Home Line of "Mill Seat," of 151 acres
N 55 E 24 rds
2nd Line of "Mill Seat," of 151 acres
N 80 E 40 rds
The given line of "Good Luck."
The part of "Good Luck," within the limits of Rock Creek Park Granted Charles Beall and Thomas Fletchall. Dec 10th 1715 for 200 Acres
Part of "Good Luck."
Park
Creek
Park
Pearce Shoemaker's
Tract No 39 Rock Creek Park
East line of Rock Creek Park
S. W. 132 rds 10th line of "Mill Seat"
4th Line of "Good Luck" 252 rds
P.M. line of "Mill Seat" N.E. 140 rds

PLAT

Showing the location of "Addition to Fellowship," "Mill Seat," and "Good Luck," original patents within the limits of Rock Creek Park

Scale of 200 ft to an inch

Oct 15th 1891

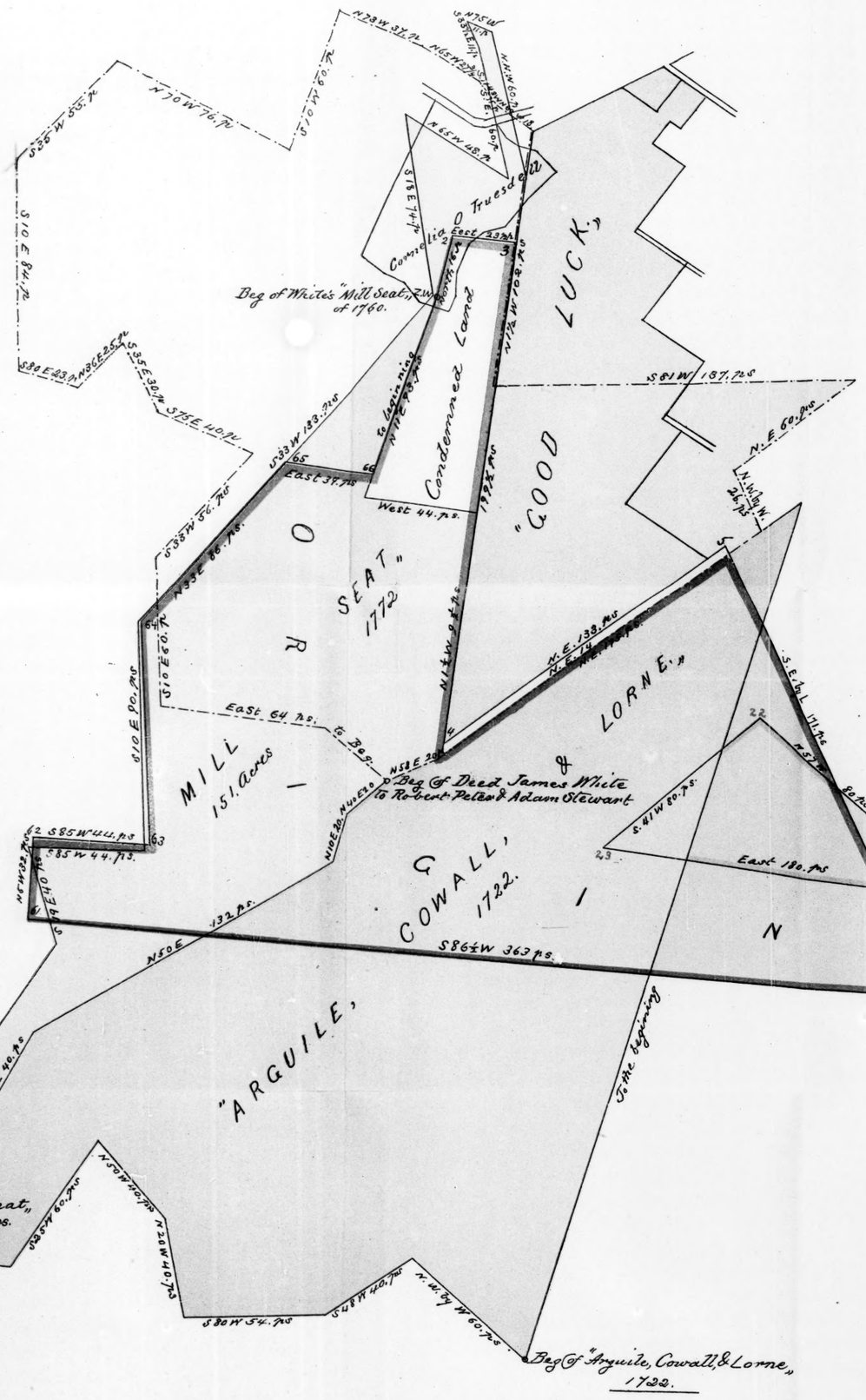
B. D. Carpenter
Surveyor

No 1197.
Shoemaker et al.
v.
Rock Creek Park
Commission.
} P. 358

United States upon petition of
Rock Creek Park Commission
vs.
Glenn W Harper, Trustee, et al
} In General Term
No 1 Original
(No 366 Dist Ct Doc)

Plat referred to as having been exhibited to the Court on behalf of the petitioners and made part of respondents Shoemakers seventh bill of exceptions.

FILED
OCT 8 1892
J R Young clerk



PLAT

Of Original surveys and resurveys of Patents granted to James White Viz:

"Whites Lot, on Dec 13th. 1739, for 50. acres.
"Addition to Whites Lot" on Dec 6th 1741. for 40 acres.
"The Diamond" on Nov 28th 1742, for 10. acres
"Resurvey on "Whites Lot" "Addition to Whites Lot" and "The Diamond" on Aug 10th 1753. for 43 1/2 Acres, including vacancies.
Resurvey on the last being all of the foregoing tracts into one entire tract to be called "Mill Seat" on Aug 29th 1760. including vacancies.
Also a resurvey of part of "Mill Seat" to be called "Mill Seat Resurveyed" March 18th 1772. for 151 acres including vacancies.
Also a plat of "Arguile, Cowall, and Lorne" for illustration.
Also plat of part of "Good Luck"

NOTE. The Original "Mill Seat" of 1760 is shown by lines bordered in red said lines are numbered from 1 to 66 in black inclusive. The "Mill Seat" of 1772 is colored in Yellow. The Resurvey on "Whites Lot" "Addition to Whites Lot" and the "Diamond" is colored and bordered in Emerald Green and numbered from 1 to 45 in red inclusive.

Scale of 30 ps to an inch
Nov 30th 1892.

B.D. Carpenter
Surveyor

No. 1197.
Shoemaker et al.
v.
Rock Creek Park
Commission
} p. 359.

United States upon petition of
Rock Creek Park Commission
vs
Glenn W. Cooper, Trustee, et al.
} In General Term
No 1 Original
(No 366 Dist. Ct. Doc.)

Plat referred to in the petition and application of respondents Shoemakers for the rescission of the order of the Court excluding testimony as to mines and which plat is made part of respondents seventh bill of exceptions.

FILED
OCT 8 1892
J. R. Young, Clerk

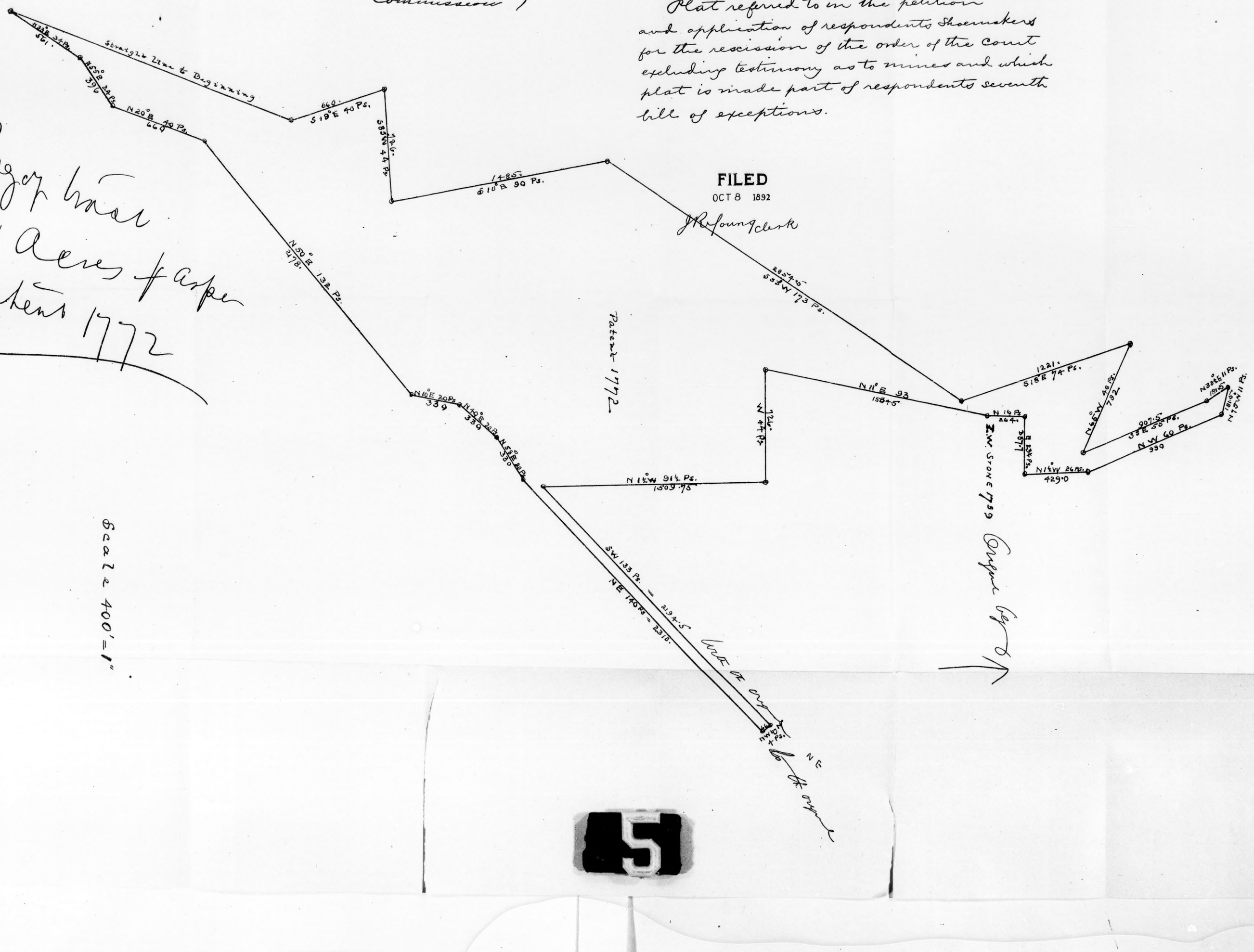
Beg. at a hickory 151 acres of Aspen Patent 1772

Scale 400' = 1"

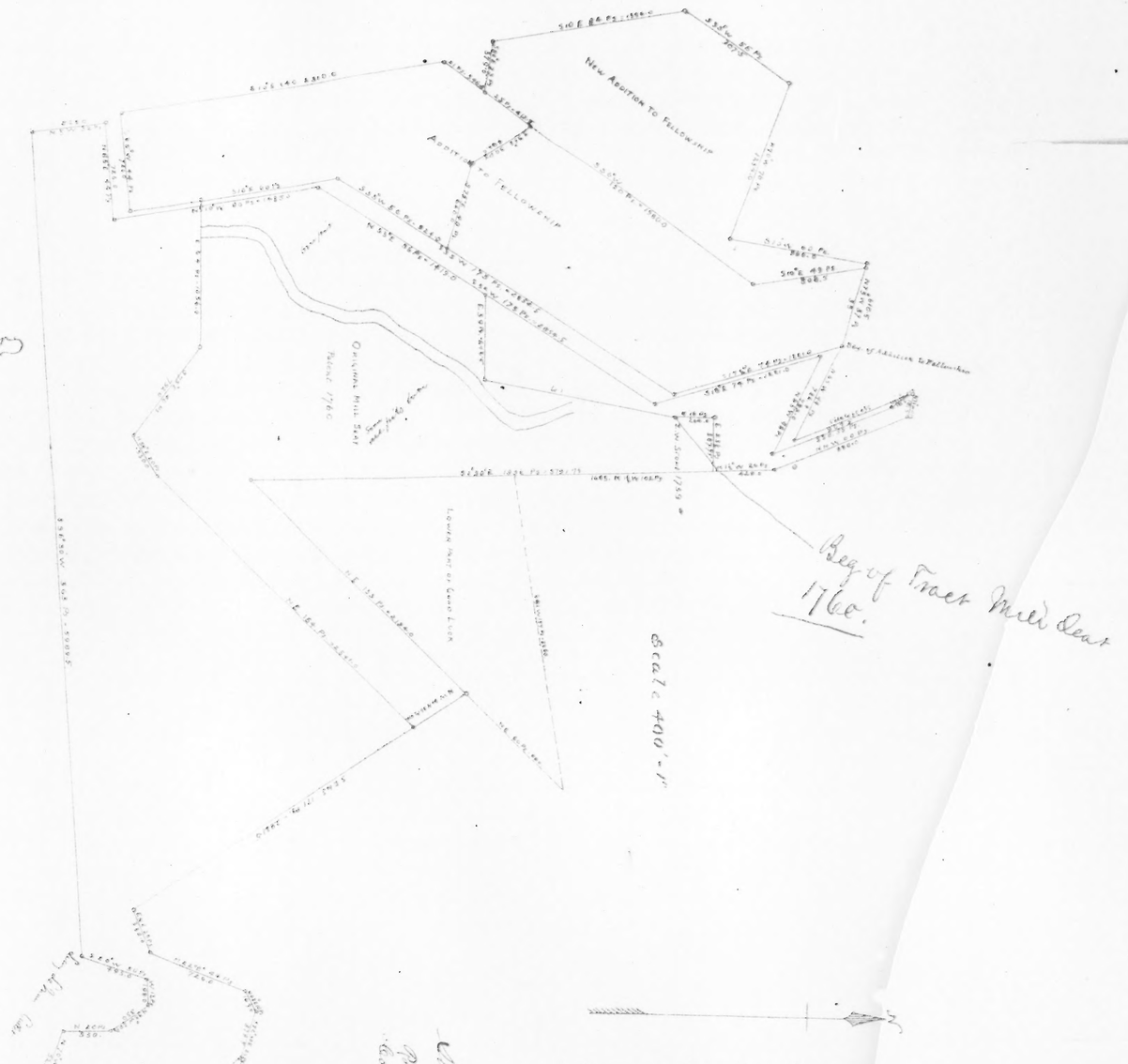
Patent 1772

Original Grant 1759

Line of original



The lines in red mk show the limits of tract 681 Acres under patents of 1760.



Plat and Survey of part of the Real Estate of Thomas Fenton Esq. in Montgomery County Pa. which he desires to have partitioned

No. 1197
Thomas Fenton et al
vs
Petition for Partition

FILED
OCT 8 1892
Prothonotary

To the Honorable the Judges of the Court of Common Pleas in and for the County of Montgomery

The petition of Thomas Fenton of Abington Township in the County of Montgomery and State of Pennsylvania respectfully represents that he is seized in his demesne as of fee of and in the undivided one half part of all that certain tract or parcel of land situate in Abington Township aforesaid containing about six hundred and eighty one acres and one hundred and sixty perches be the same more or less bounded and described as follows to wit:

Beginning at a stone in the middle of the Old York Road at the corner of land of Joseph Fenton and running thence along the middle of the said road South sixty degrees East one hundred and thirty two perches to a stone in the middle of the said road at the corner of land of Joseph Fenton aforesaid thence along the same South thirty degrees West one hundred and sixty perches to a stone at the corner of land of Joseph Fenton aforesaid thence along the same North sixty degrees West one hundred and thirty two perches to a stone at the corner of land of Joseph Fenton aforesaid thence along the same North thirty degrees East one hundred and sixty perches to the place of beginning. Excepting thereout and therefrom all that certain piece or parcel of land which the said Thomas Fenton by his deed dated the 1st day of April A.D. 1892 and recorded in the office for the recording of deeds in and for the County of Montgomery aforesaid in Deed Book No. 1192 Page 360 &c. granted and conveyed unto Abington Township for the purpose of a public road.

Your petitioner therefore prays your Honors to award a writ of partition to make partition of the said real estate to and among the parties interested according to their several rights and titles therein and to make report of the same to the next Court of Common Pleas to be held in and for the County of Montgomery aforesaid.

And your petitioner will ever pray &c.

Thomas Fenton

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ROCK CREEK PARK

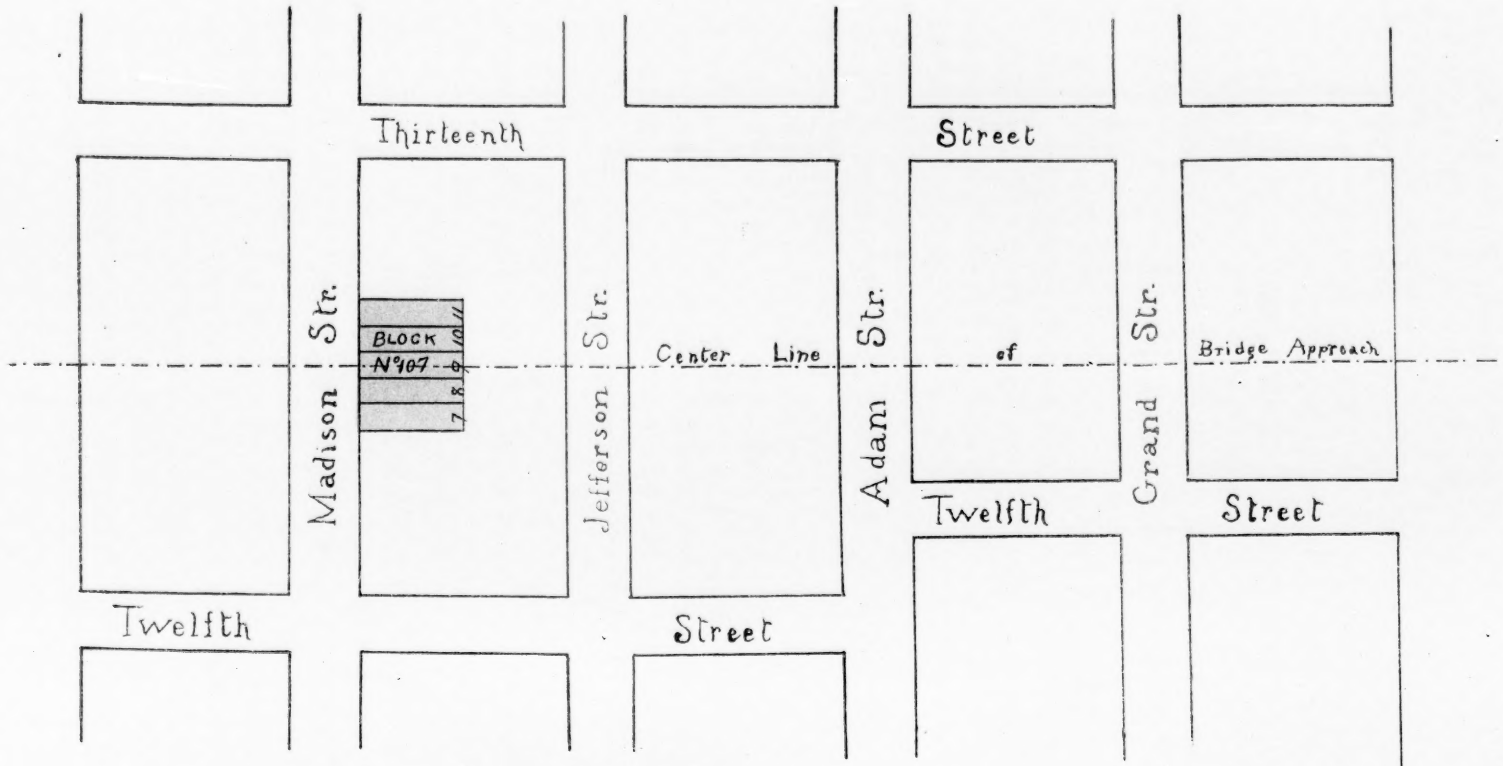
SHOWING BOUNDARIES AND PROPERTY LINES

SCALE: 1 INCH = 400 FEET

Red—Shoemaker's Estate Tracts.
Black—Individual Tracts of Louis P. and Francis D. Shoemaker.
Blue—Rock Creek and Tributaries.
Yellow—Roads.
Heavy Black Lines—Boundaries of Actual Park.

No. 1106.
Luxton
v.
Bridge Co.
} p. 16.

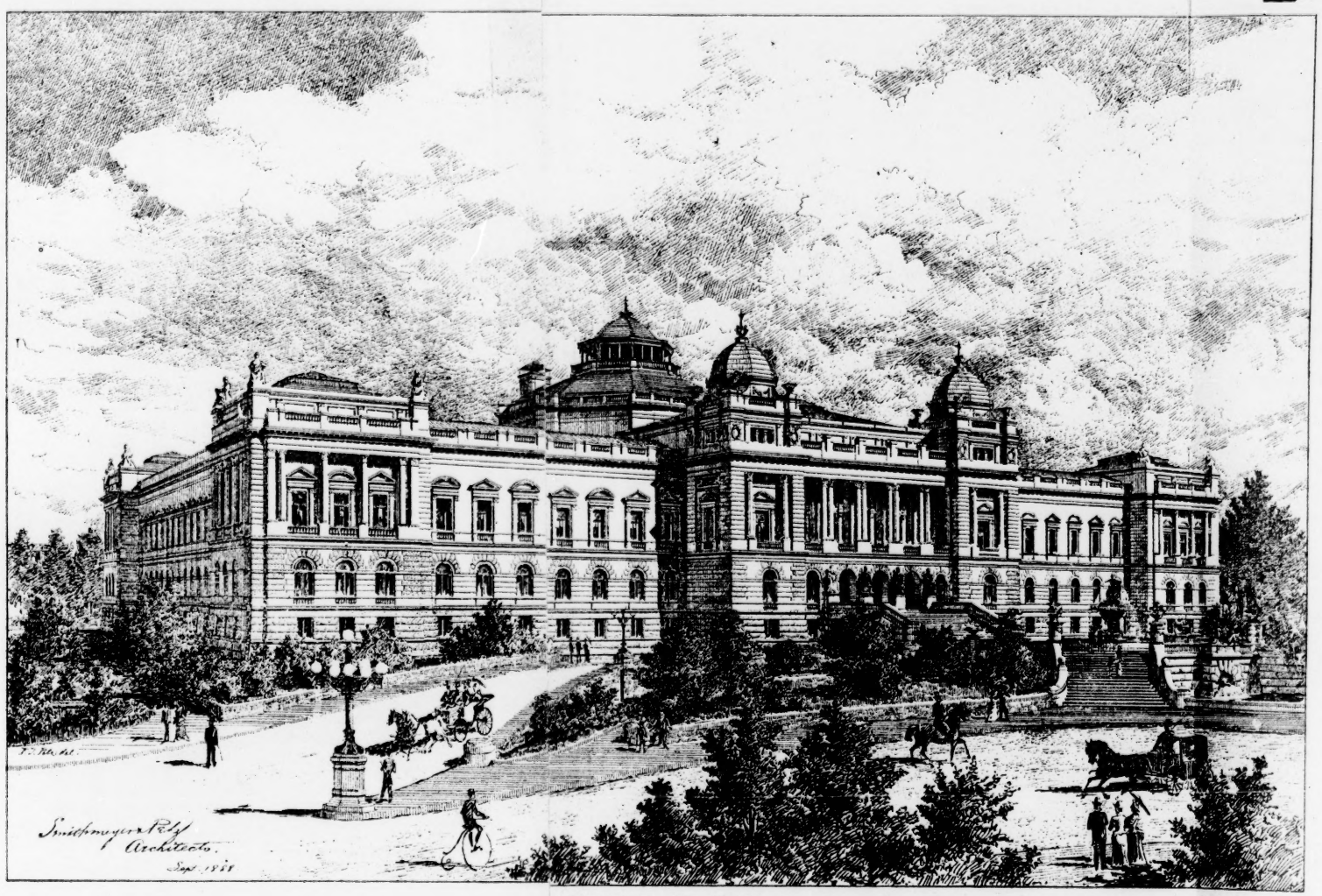
Plot of 5 Lots in Hoboken N.J., the Property of Mrs. Susan Luxton,
on the Location of Approach to North River Bridge
for the North River Bridge Company.



Approved
Gustav Lindenthal.
Chief Engineer
Jan. 28-1892

8

D



DESIGN OF THE
CONGRESSIONAL LIBRARY BUILDING

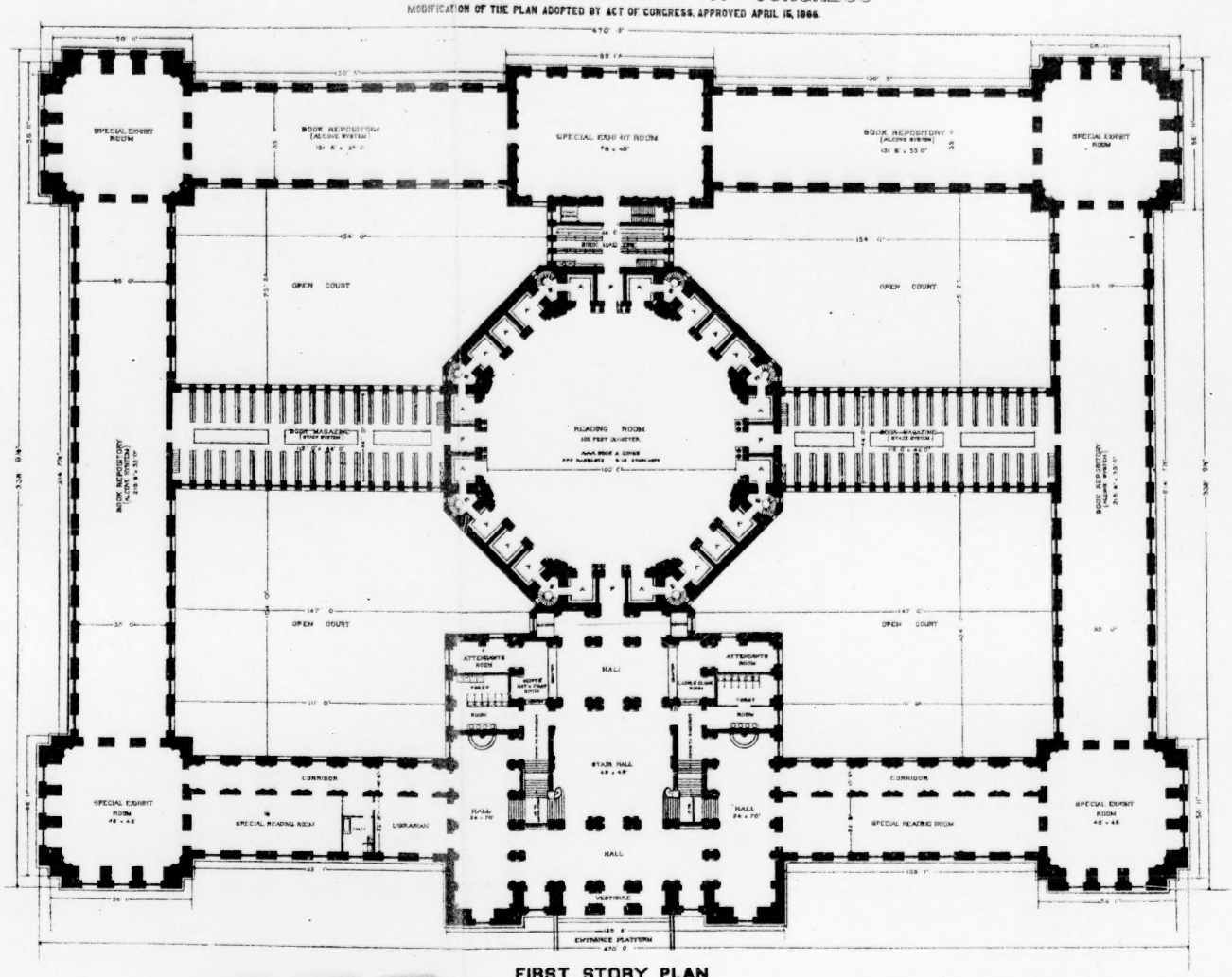
ADOPTED BY ACT OF CONGRESS, APPROVED APRIL 15, 1886.

9

D Nº IV

BUILDING FOR THE LIBRARY OF CONGRESS

MODIFICATION OF THE PLAN ADOPTED BY ACT OF CONGRESS, APPROVED APRIL 15, 1886.



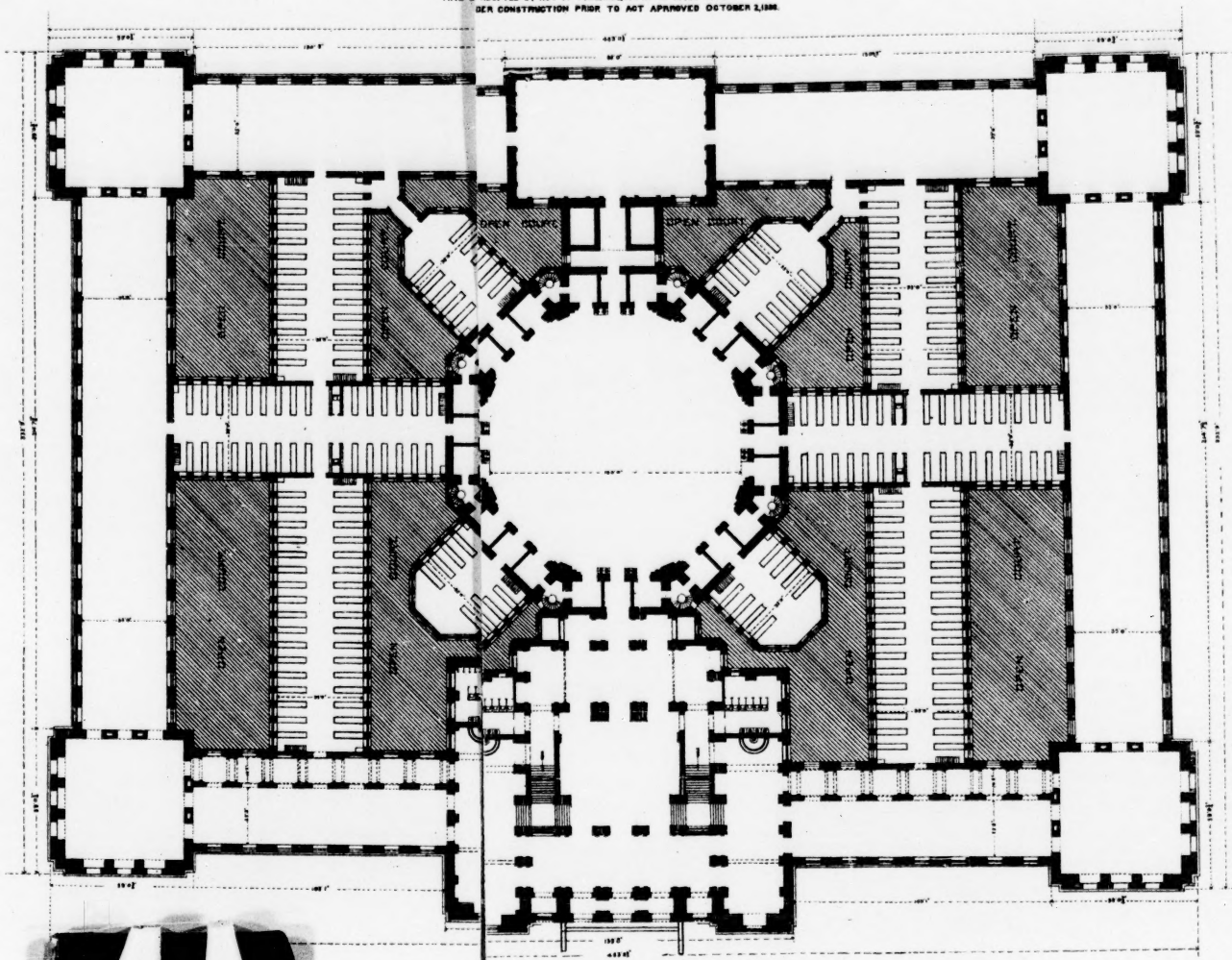
FIRST STORY PLAN

10

E

PLAN OF THE CONGRESSIONAL LIBRARY BUILDING

AND AS ADOPTED BY ACT OF CONGRESS, APPROVED APRIL 15, 1886.
UNDER CONSTRUCTION PRIOR TO ACT APPROVED OCTOBER 2, 1886.



FIRST STORY PLAN